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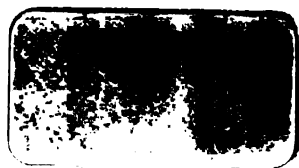


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THE
CALCUTTA
LAW REPORTS
OF
CASES
DECIDED BY THE
HIGH COURT, CALCUTTA,
ALSO
JUDGMENTS OF H. M.'S PRIVY COUNCIL.

EDITED BY
P. O'KINEALY,
OF LINCOLN'S INN, BARRISTER-AT-LAW.

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L.

The Hon. SIR RICHARD GARTH, *Knight*, *Chief Justice.*

"	"	FRANCIS BARING KEMP,	}	<i>Judges.</i>
"	"	LOUIS STEUART JACKSON, C.I.E.,		
"	"	ARTHUR GEORGE MACPHERSON,		
"	"	WILLIAM MARKBY,		
"	"	CHARLES PONTIFEX,		
"	"	WILLIAM AINSLIE,		
"	"	ERNEST GEORGE BIRCH,		
"	"	GEORGE GORDON MORRIS,		
"	"	JAMES SEWELL WHITE,		
"	"	ROMESH CHUNDER MITTER,		
"	"	HENRY STEWART CUNNINGHAM,	}	<i>Officiating as Judges.</i>
"	"	WILLIAM FRASER McDONELL, V.C.,		
"	"	JOHN PITT-KENNEDY,		
"	"	HENRY THOBY PRINSEP,		
"	"	HENRY BARING LAWFORD,		

The Hon. FRANCIS BARING KEMP was absent on leave from April 12, 1877, to August 14, 1877.

The Hon. ARTHUR GEORGE MACPHERSON retired from the Bench on October 1, 1877.

The Hon. CHARLES PONTIFEX was absent on leave from April 4, 1877, to December 13, 1877.

The Hon. ERNEST GEORGE BIRCH was absent on leave from July 17, 1877, to September 17, 1877.

The Hon. GEORGE GORDON MORRIS was absent on leave from June 18, 1877, to September 15, 1877.

The Hon. JAMES SEWELL WHITE took his seat on November 16, 1876.

The Hon. HENRY STEWART CUNNINGHAM took his seat on January 16, 1878.

The Hon. JOHN PITT-KENNEDY officiated as a Judge from April 7, 1877, to January 16, 1878.

The Hon. HENRY THOBY PRINSEP officiated as a Judge from April 13, 1877, to September 17, 1877, and again from February 16, 1878.

The Hon. HENRY BARING LAWFORD officiated as a Judge from July 18, 1877, to September 17, 1877.

The Hon. GREGORY CHARLES PAUL	...	<i>Advocate General.</i>
JOHN PITT-KENNEDY, Esq.	...	<i>Standing Counsel.</i>
JOHN D. BELL, Esq.	...	<i>Offg. „ „</i>

1 C. L. R., 100.

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ORIGINAL, APPELLATE, AND REVISIONAL

[CRIMINAL APPELLATE JURISDICTION.]

[FULL BENCH.]

TITU MYA APPELLANT.

1877
March 28.
—

*Examination of accused—Record of questions asked—Omission of
Magistrate.*

The omission of a Magistrate to have recorded in the vernacular the questions asked in the examination of the accused person does not necessarily render that examination inadmissible as evidence.

For Appellant : *Baboo Joy Gobind Shome.*

For Government : *Baboo Jugdanund Mookerjee (Junior Government Pleader.)*

THIS case was referred for the opinion of the Full Bench by MACPHERSON and BIRCH, *J.J.*, in the following terms :—

In this case the prisoner has been convicted of murder, the offence having been committed on the 10th of September last.

He was committed by Mr. Luttman-Johnson, the Magistrate of Cachar, for trial before the Sessions Court.

In the course of the enquiry preliminary to commitment, the prisoner was twice examined by the Magistrate. If the statements made by him on the occasion of these examinations are admissible in evidence, the conviction can be supported; but if

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those statements are not admissible, then there clearly is no evidence to warrant a conviction.

The question is, whether the statements made by the prisoner on those two examinations are under the circumstances admissible.

The first examination of the accused was on the 21st of September. The Magistrate, in his own hand, recorded fully in English each question and answer, and at the end he signed the memorandum, and added :—" *Note.*—The Police connected with the case were carefully excluded from the Court, and the accused was given every opportunity of correcting any of his statements. His manner was that of a person speaking the entire truth." And this note is initialed by the Magistrate and dated the same, 21st of September.

Simultaneously a mohurir, in the presence of the Magistrate, recorded in the vernacular all the answers given by the prisoner. But the questions put are not recorded in the vernacular. At the end of this vernacular record the Magistrate certifies :—" Taken in my presence and hearing, and contains accurately the whole of the statement made by the accused person,"—and this certificate is signed and dated by the Magistrate.

To this the Magistrate appends a " *Note* : The clerk has unfortunately omitted questions. They are, however, entered fully in my memorandum,"—and this he signs.

After that, a few words seem to have been added on the same day by the prisoner. They are recorded by the Magistrate in his own hand in his memorandum and simply signed by him, and they are recorded by the clerk in the vernacular and initialed by the Magistrate.

On the 12th of October, the prisoner was further examined by the Magistrate. The questions and answers are fully recorded both in the English memorandum and in the vernacular, and the record is duly tested by the Magistrate.

But neither the record of the examination of the 12th October, nor the previous record of the examination of 21st September, were signed by the accused person, as required by Section 346. Nor is there anything to show that the record of the examination—every question and every answer—was shown or read to the accused, as directed by the first clause of Section 346.

In this particular case we have no doubt that the examination of the accused was in fact carefully conducted by the Magistrate, and that all the questions and answers are accurately recorded, as regards the first examination in the Magistrate's English memorandum, and as regards the second examination, in both the vernacular and English. The error is one which, in our opinion, does not prejudice the prisoner, unless we are bound to hold as matter of law that the mere omission to comply with the provisions of Section 346 does prejudice him.

The Bombay High Court apparently considers that such an error necessarily does prejudice the prisoner and is incurable; and that the statement of the accused, unless recorded strictly as directed by Section 346, is inadmissible (see 10 Bombay Reports, 166). But the last clause of Section 346 seems to contemplate the admissibility of such records although not strictly in form, *provided the error does not prejudice the prisoner.*

The following cases bearing on the subject are reported, 21 W. R., 5; 24 W. R., 29, 42; 25 W. R., 25; 11 Bombay Reports, pp. 44 and 237; 1 Indian Law Reports, Bombay, 291.

As the question is of great importance, and opinion seems divided, we think the matter should be referred for the decision of a Full Bench.

The questions referred for the opinion of the Full Bench are:

First.—Whether the omission to obtain the signature or attestation of the accused person, as directed by Section 346, necessarily prejudices the prisoner within the meaning of the last clause of that Section and renders the record inadmissible?

Second.—Whether the omission to obtain the signature, &c., of the accused person, as required by Section 346, or the omission to record in the vernacular the questions put to the accused person, or both these omissions taken together, necessarily render the record inadmissible, even although it appears from the Magistrate's certificate that taking the English memorandum, together with the vernacular, the whole of the questions and answers are fully recorded?

Third.—Whether the defect can be cured by taking further evidence now, supposing that it can be proved that in fact the record was duly read to the accused person?

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The judgment of the FULL BENCH¹ was delivered byTITU MYA,
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GARTH, C.J. :—

Judgment.

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As regards the first point stated for our opinion, it now appears that the statement made by the prisoner does purport to bear his signature; and in the absence of any evidence to the contrary, and there being no defect in the certificate endorsed by the Magistrate in compliance with the directions of Section 346, we must take it that the signature is that of the accused person.

Then, secondly, as to the omission on the part of the Magistrate to record in the vernacular the questions put to the prisoner, it is clear that in this instance the prisoner is not, and cannot have been, prejudiced in any way by the omission. The questions were of such a nature that it is perfectly immaterial to the sense and meaning of the prisoner's statement whether they were recorded or not.

The case will go back to the Bench which referred it for disposal.

¹ GARTH, C.J., JACKSON, MACPHERSON, MARKEY and AINSLIE, J.J.

[CIVIL APPELLATE JURISDICTION.]

[FULL BENCH.]

KALI CHURN DUTT AND OTHERS PLAINTIFFS ;
 AND
 JOGESH CHUNDER DUTT DEFENDANT.

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 —

Payments of enhanced rent decreed—Liability of tenure to enhancement disallowed—Suit to recover excess payments.

J. obtained a decree, declaring that K.'s tenure was liable to enhancement of rent. He thereupon, from time to time, sued for and obtained decrees at the rate thus allowed, the ryot K. objecting. K., who had appealed to the Privy Council, obtained an order, declaring that the rent was not liable to enhancement. He, accordingly, sued to recover the excess payments of rent made by him under the decrees obtained by J., while the matter of enhancement was under appeal.

Held (per GARTH, C.J. and L. S. JACKSON, J.) that, so long as the decrees for rent at the enhanced rates remain unreversed expressly, no suit will lie to recover money paid under them. *Marriott vs. Hampton*, 2 Sm. L.C., 6th Ed., p. 375.

Contra (per MACPHERSON, MARKBY and AINSLIE, J.J.) that, admitting this general principle, under *Shama Proshad Roy Chowdry vs. Hurro Proshad Roy Chowdry* (10 Moore Ind. App., 203), the right to enhance the rent being disallowed, the decrees for rent at enhanced rates obtained during the pendency of the determination of that right were affected, and a suit would lie to recover excess payments made thereunder.

REGULAR Appeal from the order of Baboo Krishna Mohun Roy, Sub-Judge of the 24-Pergunnahs, dated April 17th, 1876.

For Plaintiffs, Appellants: *Mr. R. E. Twidale.*

For Defendant, Respondent: *Baboo Girja Sunkur Mojomdar.*

This case was referred to a Full Bench by GARTH, C.J., and McDONELL, J., in the following terms:—

This was a suit to recover certain sums by way of enhanced rent, which the plaintiff has been compelled to pay to the present defendant under certain decrees hereinafter mentioned.

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The facts are these :—

The plaintiff claimed to hold certain property under the defendant at a permanent fixed rent of Rs. 461.

The defendants brought a suit against him to enhance that rent, and one of the grounds of defence was, that the rent was not legally capable of enhancement.

The Court of First Instance gave the plaintiff a decree for an enhanced rent of Rs. 2,417, and the High Court on appeal affirmed that decree.

On appeal to the Privy Council, their Lordships on the 25th day of March 1873,¹ reversed the judgments of both Courts, and held that the old rent could not legally be enhanced.

Meanwhile between the date of the first decree for the enhanced rent, and the judgment of the Privy Council reversing that decree, the present defendant brought several suits for the enhanced rent against the plaintiffs, and obtained judgment for various sums amounting to Rs. 8,561, which sums were duly paid by the present plaintiff.

No application was made by the present plaintiffs for a review of those judgments, but, on the 25th of November 1875, this suit was brought by the then plaintiffs to recover from the defendant the sum of Rs. 8,561, being the difference between the amount of enhanced rent recovered under those judgments and the amount of the fixed rent, which the plaintiffs were bound to pay.

The Courts below have given the plaintiffs a decree for this difference.

From this decree the defendant has appealed, and he contends that, according to the well-known rule of law laid down in *Marrriott vs. Hampton*², money paid under the judgment of a competent Court cannot be recovered back so long as that judgment remains unreversed.

The plaintiff, on the other hand, contends that the case of *Shama Prosad and others versus Huro Prosad and others*,³ is an authority in his favor, and that the judgment for enhanced rent obtained after the suit for enhancement was decreed, must be considered as

¹ 19 W. R., 353; 12 B. L. R., 229.

² 2 Sm. L. C., 6th Ed., p. 375.

³ 10 Moore Ind. App., 203; 3 W. R., 11, P. C.

superseded by the judgment of Privy Council reversing that decree.

The case of *Raja Nilmoni Singh Deo Bahadur, vs. Saroda Perahad Mukerji*, decided by Justices Kemp and Pontifex on 31st December 1872,¹ seems to favor this view; whereas the case of *Murari Mohajun vs. Mahomed Akmal*,² decided by Kemp and Birch, J.J., seems opposed to it—see also decisions of Phear and Morris, J.J., in the case of *Mewa Lall Thakoor vs. Bhugoban Jha*.³

The point being an important one, and the decisions upon it being apparently conflicting, we think it right to refer this question to a Full Bench.

Whether the plaintiff is entitled to recover in this suit the difference between the fixed rent and the enhanced rent, which he has paid to the defendant under the above circumstances.

The following judgments were delivered by the Judges of the FULL BENCH :—⁴

GARTH, C.J. (Jackson, J., concurring)—

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I am of opinion that the decree made by the Privy Council in the case of *Ram Churn Dutt vs. Romesh Chunder Dutt*⁵ did not supersede or modify the several decrees which had been previously obtained for enhanced rent by the present defendant; and consequently that plaintiffs in this case are not entitled to recover.

The plaintiffs base their claim entirely upon the authority of the case of *Shama Persad vs. Tara Persad*⁶ contending that the principle upon which that case proceeded, applies to the present, and that the decrees for enhanced rent, obtained by the present defendant since the year 1864, have been partially superseded or modified by the decree of the Privy Council in the above case of *Ram Chunder Dutt vs. Romesh Chunder Dutt*.⁴

We are bound of course to accept the decision in *Shama Persad vs. Tara Persad*⁶ as binding upon this Court, so far as it goes;

¹ Law Obs., 1872-3, p. 76.

² 22 W. R., 161.

³ *Ibid*, 213; 13 B. L. R., 11 App.

⁴ 19 W. R. 353; 12 B. L. R., 229.

⁵ 10 Moore In. App., 203; 3 W. R., 11 P. C.

⁶ GARTH, C.J., JACKSON, MACPHERSON, MARKBY and AINSLIE, J.J.

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but, if the principle of it is to be extended, as the plaintiffs contend it ought to be, it will lead, in my opinion, to very inconvenient consequences, and to a direct departure from a rule of law which has been established for years, and has always been acted upon in England and in this country.

Now, in order to see how far the authority of the case of *Shama Persad vs. Tara Persad*¹ is applicable to the present case, it is necessary to ascertain in the first place what the grounds of that decision really were.

The case was a very peculiar one.

In the year 1821, Doorga Pershad, claiming to be heir to his uncle, brought a suit against Shama Persad, a debtor to his uncle's estate, for Rs. 23,024, the principal and interest due upon a bond.

Pending this suit, Tara Persad sued Doorga Persad for one-half of the uncle's property, and in 1829 a compromise was effected of that suit, under which Tara Persad became entitled to a six-anna share of the debt due from Shama Persad.

Subsequently to this, Doorga Persad obtained a decree against Shama Persad for the principal and interest due upon the bond. From this decree Shama Persad appealed to the Sudder Court, and pending that appeal, in 1831, there was a compromise of that suit also, under which Shama Persad was to pay Rs. 27,217 at the end of three years, without interest, in default of which payment Doorga Persad was to be at liberty to realize the amount. This compromise was made without Tara Persad's knowledge, and Shama Persad did not pay the stipulated amount at the end of the three years.

In this state of things, Tara Persad, in March 1835, brought another suit against Doorga Persad, claiming a six-anna share of the bond debt and interest due up to the commencement of Doorga Persad's first suit in 1821; and in his plaint he reserved to himself the right of bringing another suit for his share of the interest upon the bond debt from 1821 to the 27th July 1829, on which day Doorga Persad obtained his decree against Shama Persad.

This suit was carried through the Courts of this country up to the Sudder Dewany Adawlut, where eventually a decree was made

¹ 10 Moore In. App., 203; 3 W. R., 11, P. C.

against Doorga Persad for the entire amount of principal and interest sued for.

From this decree Doorga Persad appealed to the Privy Council, who decided in 1849, that the decree of the Sudder Court ought to be reversed, and that Doorga Persad was not liable to Tara Persad for the whole amount of his six-anna share and interest of the debt. Their Lordships held, *that Doorga Persad ought to be considered as a Trustee for Tara Persad, and was only responsible for so much of the debt as he had actually received, or without his wilful default might have recovered*; and an order was made accordingly by their Lordships, that the decree of the Sudder Dewany Adawlut should be reversed; that Doorga Persad should be declared liable to Tara Persad for a six-anna share of what he had received, or might thereafter receive, or what he might have received but for his wilful default, for and in respect of the sum of Rs. 24,217-12-17, and the interest thereon; *and the case was referred back to the Sudder Dewany Adawlut to ascertain, carry out, and enforce the rights and liabilities of the parties as above declared.*

From the 11th of March 1835, when the above suit was commenced, to the 5th of July 1849, when the judgment of the Privy Council was pronounced, upwards of 14 years had elapsed; and during that interval, in the year 1842, an action was brought in this country by Tara Persad against Doorga Persad to recover Rs. 4,593-12-9, being the amount of interest on the six-anna share of the bond debt, for which in his previous proceedings he had reserved his right to sue; and in this action he obtained a decree for the Rs. 4,593-12-9, with interest at 12 per cent., amounting to Rs. 11,127-15-8, which he accordingly paid thus: Rs. 8,200-7-3 on the 28th of April 1848, and Rs. 2,927-8 on the 4th August 1857.

Several attempts were made by Doorga Persad to have this decree for interest dealt with and adjusted by the Sudder Dewany Adawlut, as part of the entire subject-matter of the first suit, upon which the Privy Council had passed their judgment; but failing these attempts, he brought a suit against Tara Persad to recover back the Rs. 11,127-15-3, which he had been unjustly compelled to pay.

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The suit was decided against him by the Courts of this country, and was taken on appeal to the Privy Council, where the judgment was given, which has been the subject of so much discussion, and which is insisted upon here by the plaintiff as a conclusive precedent in his favour.

Their Lordships in that case distinctly affirmed the well-known principle of law, that in this country, as in England, money recovered under a decree or judgment cannot be recovered back in a fresh suit, so long as the decree or judgment, under which it was recovered, remains in force. They go on to say, that this rule of law rests upon the ground, that the decree or judgment must be considered as subsisting, until it has been *reversed* or *superse-eded* by some ulterior proceeding. But when it has been so reversed or superseded, the money paid under it may be recovered back.

Their Lordships then go on to say, that the decrees in this country, under which the sum of Rs. 11,127-15-3 was recovered were in fact superseded by the order of Her Majesty in Council in 1849. That order, they considered, extended not only to the claim of the plaintiff in the particular suit in which it was made, but to the adjustment of the rights and interests of the parties in the entire subject-matter of that suit. The order had declared Doorga Persad to be a trustee for Tara Persad of the whole six-anna share of the bond *and interest*; and it had directed the Sudder Dewany Adawlut to *adjust* and *enforce* the rights and liabilities of the parties in accordance with the directions of the Privy Council. If this order had been obeyed by the Sudder Dewany Adawlut, as their Lordships say it ought to have been, the interest in question, Rs. 11,127-15-3, would have been refunded to Doorga Persad by the order of the Sudder Dewany Adawlut under and by force of their Lordship's previous decree; because that *decree* had *superseded* and *annulled* what their Lordships call the "*dependent and subordinate decrees*," which had been obtained for the interest.

But as the Sudder Dewany Adawlut failed to take any steps to carry out the directions of the Privy Council, their Lordships considered that the Rs. 11,127 were recoverable by a fresh suit, and they accordingly reversed the decree of the Sudder Court, and adjudged to the plaintiff that amount, with interest at 12 per cent.

Now two things appear to me clear from this judgment—

1st.—That the Privy Council had no intention of questioning the authority of the rule laid down in *Marriott vs. Hampton*, 2 Sm. L.C., 6 Ed., p. 375. On the contrary, they distinctly affirm it; because they say that, as long as the decree and judgment under which money has been obtained remains in force, no money paid under it can be recovered back; and

2nd.—That their Lordships' judgment is based entirely upon this principle, viz., that the effect of the order of Her Majesty in Council made in 1849 was not only to reverse the judgment in the case which was then *sub judice*, but also to supersede and annul *ipso facto* the decrees which had been made in another suit.

I have searched in vain to find any other instance in which the decree of an Appellate Court in one suit has been held to have the legal effect of annulling or altering *ipso facto* a decree made by a subordinate Court in another suit; but of course we are bound here to treat the decision of the Privy Council as binding upon us as far as it goes, and to deduce as carefully as we can from the language of the judgment, what was the ground upon which their Lordships considered that the order made in the first suit in 1849 had the effect of superseding the decree for the Rs. 11,127 interest.

It appears to me that the only explanation of the apparent difficulty is this. That in the decree of 1849, their Lordships assumed to deal, and were in fact dealing, not only with the actual claim made in the suit, but with the *status* and rights of the parties with reference to the whole subject-matter of it. They declare that Doorga Persad was a trustee of Tara Persad upon certain terms and conditions; and they directed the Court here to adjust the rights and liabilities of the parties in accordance with that declaration; and as the interest of the bond (Rs. 11,127) formed part of the fund, in respect of which that trust had been declared, their Lordships considered that, although a decree had been obtained in the Courts here for the interest, that decree was as much dealt with and superseded by their judgment, as the decrees which had been made with reference to the remainder of the bond debt.

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Upon this ground, and upon this ground only, it appears to me their Lordships' judgment proceeded; and I do not understand that they intended to overrule the principle laid down in *Marriott vs. Hampton*, or to prescribe a different rule of equity in this country, from that which obtains in England.

It does not appear to me that their decision can be considered as governing the present case, unless we can find that the decree made by their Lordships on the 25th of March 1873, reversing the first judgment for the enhanced rent, had the legal effect *per se* of superseding or modifying the subsequent decree for enhanced rent, obtained between the year 1864 and the 25th of November 1875.

Now, on looking at the language of their Lordships in that decree, I cannot discover, that they dealt, or intended to deal, with anything else, than the actual subject-matter of the suit upon which they were engaged.

Their judgment involves no change in the mutual relation of the parties. Their Lordships give no directions to the Courts of this country as to adjusting the parties' rights or liabilities. They simply decide the question whether or no the plaintiff was or was not entitled to enhance the plaintiffs' rent; so that, unless we are to hold that in every case the decree of an Appellate Court has the effect of superseding or modifying every other decree inconsistent with it, which may have been made between the same parties in any other suit brought in a Subordinate Court upon the same subject-matter, I do not see how we can consistently say that the decree of the Privy Council of the 25th March 1873 has superseded or modified the subsequent decrees for enhanced rent obtained by the present defendant.

It will be observed that in the case of *Doorga Persad* against *Tara Persad*, the decree which was superseded by the judgment of the Privy Council was for interest, which that judgment had declared not to be payable, and which their Lordships had in fact directed the *Sudder Dewany Adawlut* to restore to *Doorga Persad*, so that the effect of Her Majesty's order, according to the view which their Lordships took of it, was to supersede the decree for interest altogether.

But here the case is very different. Their Lordships here have given no direction, which could have the effect of superseding

or altering any other decrees; and it is not contended that these subsequent decrees are *absolutely superseded*. It is said, that they are only modified, or in other words, that the Privy Council's judgment has had the effect, *per se*, of altering a judgment for one sum into a judgment for another sum.

But if that is so, and if this principle is to be consistently carried out, the amount of costs ought to be altered also.

This doctrine is certainly a novel one; and, if we are to apply it in all cases—as of course we must (if we are to act consistently)—it will be attended with some strange consequences.

The rule, if it is to be applied in the case of one of the parties, must be applied also in the case of the other.

Thus, if in a suit like the present, a claim can be made by the tenant to recover sums which he has overpaid to the landlord, the landlord ought to have a corresponding remedy if the state of things are reversed.

Suppose that in the original suit the Courts here had decided that the landlord was not entitled to the enhanced rent, but the Privy Council overruled that judgment, and decided that he was so entitled; and suppose, also, that, pending the appeal to the Privy Council, the landlord had brought several suits for the enhanced rent, but in each had only recovered the original rent, if the above principle is to be carried out, the landlord would be entitled in a fresh suit to recover the enhanced rent which he had failed to recover in his subsequent suits here, and to which the Privy Council had declared him entitled.

So again, if the rule is to apply to cases of landlord and tenant, it must apply to all other cases where the relative rights of parties are determined in one suit, and claims founded on those rights are enforced in subsequent suits. (The case of *Shama Persad vs. Tara Persad* was not a case between landlord and tenant.)

Thus, for instance, A. sued B. to recover the value of coal, which he claims as having been taken out of his coal-mine. The question depends upon whether B. has a right to take the coal from a particular area; and A. obtains a decree for damages upon the ground that B. has no such right. B. appeals to the High Court; meanwhile B., continuing to take the coal, A. brings another suit

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against him for damages, and recovers. The High Court reverses the original decree; B may then sue for the damages, which he has paid in the second action, as money had and received to his use.

But if this is to be law, the converse proposition ought to hold good also. That is to say, suppose the decree in the first suit to be in favor of B., on the ground that B. *had* a right to get the coal, and A. appealed; and pending the appeal, A. brought another suit against B., and failed upon the same ground. The Court of Appeal reverses the first decree. Surely A. ought to be entitled to recover by a fresh suit the value of the coal which was denied him in the second action.

It would be a palpable injustice to allow one party to avail himself of the judgment of the Appellate Court, and not the other.

In the cases above-mentioned, the question as to the sum to be recovered, would be tolerably simple. But suppose a case of this kind:—A. sues B. for damages for building a house upon two pieces of land which he claims—Blackacre and Whiteacre. The question is, whether B. has any right to do this. The Court decides that he has not, and awards damages to A. B. appeals. Meanwhile, the building still going on, A. brings a fresh suit for damages, which he has a right to do for the continuing trespass, and recovers further damages. The Court of Appeal reverses the first judgment in part, upon the ground that B. had a right to build on Blackacre, but not on Whiteacre; and reduces the damages accordingly. Can B. sue to recover *part of the damages* incurred in the second action? and if so, what part? And how is the amount to be ascertained? In other words, to what extent, if at all, has the judgment of the Appellate Court *superseded* or *altered* the decree of the Subordinate Court?

Then again it must be borne in mind that, if a decree of one Appellate Court is to have the effect of reversing or altering decrees in other suits, the same effect must be given to a decree of any other Appellate Court under similar circumstances. The decree of the Privy Council, as an Appellate Court, cannot have a different effect from that of the High Court, or the District Court, or the Court of the Subordinate Judge, in its Appellate capacity.

Thus suppose that, in a suit by a landlord against a tenant for enhanced rent, the Moonsiff gives the plaintiffs a decree. The case is appealed to the Subordinate Judge, who reverses the Moonsiff's judgment. Meanwhile, a second decree has been obtained before the Moonsiff for the enhanced rent, and the tenant has paid the amount.

The tenant under these circumstances would be entitled by force of the judgment of the Subordinate Judge to recover from the landlord the amount which he has overpaid under the second decree.

But the landlord then takes the Subordinate Judge's judgment upon special appeal to the High Court; and the High Court reverses that judgment and affirms the Moonsiff's.

The consequence would be that the landlord would be entitled to recover in a third suit the sum which he had previously recovered from the tenant in the first suit, and which the tenant had recovered back from him in the second suit.

If this state of the law is to prevail in this country, it is difficult to see where litigation is to stop, or where people's rights are ever to be considered as finally determined.

If, in cases like the present, it is right that the English rule should be departed from at all, it appears to me that a review of judgment would be not only the most complete, but the most appropriate and unobjectionable remedy; but this point we are not asked to decide by the present reference.

The only question before us is, whether the present suit will lie, and I am strongly of opinion that it will not. I consider that it does not come within the principle of the case of *Sama Persad vs. Tara Persad*¹ decided by the Privy Council, and I cannot help deeply regretting the conclusion at which the majority of my learned brothers have arrived.

It is a conclusion directly opposed to what I consider a valuable and well-established rule of law, and I believe that it will be attended with most inconvenient and mischievous consequences.

The case will be sent back to the Division Bench for final disposal, and, speaking only for myself, I trust that the very serious question involved in the case may be taken up in appeal to the Privy Council.

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¹ 10 Moore Ind. App., 203: 3 W. R., 11, P. C.

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Mr. Justice Jackson desires me to say that he concurs in this judgment.

MACPHERSON, J. :—

In my opinion, the principle on which the Privy Council acted in the case of Shama Persad Roy Chowdhry¹ is applicable, and the plaintiff is entitled to recover the difference between the rent for which he was really liable, and the enhanced rent which he paid pending his appeals against the decree by which the rent was enhanced.

That decree (although in a suit instituted in 1859 before Act X came into force) was made by the Principal Sudder Ameen on the 29th June 1868. Appeals to the Judge of the District, and to this Court, were decided on the 18th of June 1864 and the 6th of February 1865² respectively. An appeal to the Privy Council was filed here on the 20th of July 1865, and was finally disposed of by the decree of the Privy Council of the 5th of May 1873,³ which reversed the decisions of the Courts in this country, and found that the tenure was not liable to enhancement.

Pending these proceedings, the zemindar instituted no less than sixteen different suits for rent at the enhanced rate. Of these suits, twelve were brought under Act X of 1859, and four under Act VIII (B. C.) of 1869. In the first two of these suits, a portion of the claim was for rent at the old rate, for a period antecedent to the original decree for enhancement.

I assume that the plaintiff is in equity and good conscience entitled to have the whole of the rent, which he paid at the enhanced rate, refunded to him. All these decrees for the enhanced rent were based solely upon the decree for enhancement which the Privy Council reversed in May 1873. And the only question to be decided now is, whether the plaintiff (if he has any remedy at all) is technically wrong in the remedy which he seeks.

The contention is, that, as these subsequent decrees for rent at the enhanced rate are still unreversed, a suit will not lie to recover the money paid under them. Is it suggested that, though our

¹ 10 Moore Ind. App., 203; 3 W. R., 11, P. C.

² 2 W. R., 47, Act X cases.

³ 19 W. R., 353; 12 B. L. R., 229.

Courts had decided that the rent could be enhanced, the plaintiff ought not to have submitted to these latter decrees, but should have contested each case and appealed, if necessary, to the Privy Council in each. And it is also said that he should apply, or should, on the Privy Council making its order in May 1873, have applied for a review of judgment in each of the sixteen cases, and, having got the judgments reviewed and reversed, should obtain restitution in each suit.

In thirteen out of the sixteen suits the decree was for a sum under Rs. 1,000 (and in seven of them, it was for less than Rs. 500). And I should hesitate before declaring that, in the circumstances in which the plaintiff was placed, he was bound to appeal all these suits, and incur the enormous expense necessarily involved in such a course—an expense far exceeding the amount in dispute.

As to applying for a review in each case, it is exceedingly doubtful, to say the least of it, how far a review could be obtained, or could at any time have been obtained in the cases under Act X of 1859, even supposing it obtainable in the four cases under Act VIII (B.C.) of 1869. But, if it be granted that a review might have been obtained in each of the sixteen suits, that mode of proceeding would have been on the whole much more cumbrous and inconvenient than the single suit which the plaintiff has instituted embracing his whole claim.

Of course, these questions of convenience and the like could not be taken into consideration at all if there were any fixed rule prohibiting this suit from being brought. It seems to me, however, that, not only is there no such fixed rule, but, that the Privy Council has expressly decided (in *Shama Persad Roy's case*¹) that a suit, such as this, may properly be entertained by the Court.

In their judgment, it is said :—“There is no doubt that according to the law of England—and their Lordships see no reason for holding that it is otherwise in India—money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered

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¹ 10 Moore Ind. App., 203; 3 W. R., 11 P. C.

² 10 Moore Ind. App., 211; 3 W. R., 13 P. C.

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remains in force. But this rule of law rests, as their Lordships apprehend, upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and, as their Lordships conceive, is recoverable either by summary process or by a new suit or action. The true question, therefore, in such cases is, whether the decree or judgment under which the money was originally recovered has been reversed or superseded."

Applying that rule to the case before us, I think that the original decree (which was the sole basis of all the decrees made pending the appeal) having been reversed by the Privy Council, all the subsequent decrees were superseded by the Privy Council's order. It was plainly intended by the Privy Council's order, which decided that the rent of the tenure could not be enhanced, that the plaintiff should not pay rent at any rate higher than that for which the tenure was declared to be liable, and it is practically a contravention of the order to permit the decrees obtained by the zemindar pending the appeal to interfere with that intention. The subsequent decrees were mere subordinate and dependent decrees, and they cannot, under the circumstances of this case, be held to have remained in force, so far as the enhanced rate of rent was concerned, when the decree on which they were dependent has been reversed.

I am aware that in Shama Persad Roy's case the order made by the Privy Council turned in some degree on the peculiar terms of their original order. But, giving full weight to that fact, it seems to me clear that their Lordships admit the principle that the main decree, being reversed, which was the basis of the subsequent decrees, these latter being subordinate and dependent decrees, were superseded. It cannot be disputed that, although the later and subordinate decrees remained unreversed, the Privy Council held that 'a separate suit lay to recover what had been wrongly paid under those decrees. And this was evidently the view taken of the effect of Shama Persad Roy's case, by KEMP and PONTIFEX, J.J., in the case of Rajah Nilmonnee Singh vs. Saroda Prosad Mookerjee (decided on the 2nd September 1872, and reported in the "Law Observer" for that year, p. 76.)

The question of limitation is not raised in the order of reference ; but I incline to agree with the Subordinate Judge (and substantially for the reasons given by him) in thinking that the suit is not barred.

The circumstances of this case are peculiar; and it is impossible, in dealing with it, to lay down any rule of very general application. The plaintiff has practically no remedy unless this suit will lie.

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MARKBY, J. :—

I concur in this judgment.

MARKBY, J.

AINSLIE, J. :—

It is obvious that the defendant has received from the plaintiff, under successive decrees made during the long period that elapsed between the decree for enhancement and the reversal of that decree by the order of Her Majesty in Council, sums of money for enhanced rent, to which the final order in the enhancement suit shows that he is not entitled.

The plaintiff, as tenant, persistently refused to acknowledge his liability, and compelled his landlord to recover the rent by suit, in order, as I understand it, to have a formal record that he only paid under compulsion.

The Courts were bound to follow the existing judgment, by which the liability of the plaintiff to pay enhanced rent had been declared. They had no option in the matter at the time.

Under such circumstances I cannot conceive that it was their intention to declare finally that the defendant was entitled to the enhanced rent for the periods covered by the several suits, irrespective of the result of the appeal to Her Majesty in Council, which was delayed for some 14 years.

The order of Her Majesty in Council was such that, if it had been known at the time of making the decrees, they must, of necessity, have gone the contrary way, so far as the enhanced portion of the rent claimed was concerned; and, therefore, it seems to me that it did at once supersede the decrees leased upon the reversed order of the High Court.

There appears to me to be a wide distinction between the re-

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opening of decrees based upon, and necessarily controlled by a previous decree subsequently reversed in appeal, and the re-opening of decrees which the Court making them might have varied had it not thought fit to follow a decree afterwards set aside.

Looking to the case of Doorga Persad *vs.* Tara Persad,¹ I am of opinion that there is authority for saying that the former class of decrees is, *ipso facto*, superseded so soon as the controlling decree is nullified, and that what may have been done under them is not final, but may be undone. The mode of proceeding for this purpose is not a question of serious importance. I agree in the judgment of Mr. Justice Macpherson.

¹ 10 Moore Ind. App., 203; 3 W. R., 11 P. C.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF HIRAN MIYA, *alias* ABDOOL } PETITIONER.
 WAHID (*convict*) }

1877
 July 12.

Section 25, Evidence Act—Confession to a Police Officer.

Under Section 25 of the Indian Evidence Act I of 1872, a confession made to a Police is inadmissible in evidence except so far as is provided by Section 27. It is immaterial whether such Police Officer be the Officer investigating the case—the fact that such person is a Police Officer invalidates a confession.

THE Petitioner was convicted by a Magistrate, and his appeal was dismissed by the Sessions Judge of Sylhet.

For Petitioner : *Baboo Joy Gobind Shome.*

For Govt. : *Baboo Jugdanund Mookerjee (Junior Govt. Pleader).*

The facts of the case and the arguments before the High Court are sufficiently set forth in the judgment of that Court, which was delivered by

AINSLIE, J. :—

AINSLIE, J.

We think that the conviction in the present case must be set aside. That conviction is substantially based upon the statement made by the accused to one Mosun Ali, the Sub-Inspector of Thannah Abidabad. The Judge says that “it is perfectly true that Mosun Ali is a Police Officer, but it appears from his evidence that he had come to Sylhet to give evidence in another case; that he was in no way connected with the investigation of this case; and that the appellant came to him as to a personal friend and asked his advice of his own accord.”

The 25th Section of the Evidence Act says, without limitation or qualification, that “no confession made to a Police Officer shall be proved as against a person accused of any offence.”

It has been contended that this Section is to be read as if it ran “no confession made to a Police Officer investigating a case;”

AINSLIE and McDONELL, J.J.

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that in the present instance, the Police Officer to whom the confession was made did not even belong to the same Police Division; that he was only casually brought into contact with the accused; and that, therefore, this Section cannot apply.

It appears to me that Section 26 shews that this is not the true construction of the 25th Section. That Section deals with confessions made in the presence of a Police Officer who has the custody of an accused person, that is, of a Police Officer who is concerned more or less in the investigation of the case; and those confessions are absolutely excluded, whether made to a Police Officer or to any other person, unless made in the immediate presence of a Magistrate. This Section would necessarily include the 25th Section if it is to be read as suggested, and thus make it useless. But this could not be intended, and therefore it is clear that the proper construction is one that excludes confessions to a Police Officer under any circumstances, or to any one else which the person making it is in a position to be influenced by a Police Officer unless the free and voluntary nature of the confession is secured by its being made in the immediate presence of a Magistrate, in which case the confessing person has an opportunity of making a statement uncontrolled by any fear of the Police.

In the case reported in 1 Indian Law Reports, page 207, the learned Chief Justice expresses the opinion that the term "Police Officer" should be read not in a strict technical sense, but according to its more comprehensive and popular meaning. In that case, although it was admitted that the confession was made to Mr. Lambert at a time when he was not acting as a Police Officer, but as a Magistrate, and that there was no danger that a gentleman in Mr. Lambert's position would extort a confession, the Court considered itself bound to give the accused the benefit of the literal construction of the words of Section 25.

It seems to me that we could not venture to adopt the view of the law contended for by the learned Junior Government Pleader without opening the door to perversion of the intentions of the Legislature.

The petitioner will be discharged from bail.

[CIVIL APPELLATE JURISDICTION.]

[FULL BENCH.]

CHUNDER COOMAR ROY AND	}	DECREE-HOLDERS ;
OTHERS		
AND		
BHOGOBUTTY PROSUNNO ROY AND	}	JUDGMENT-DEBTORS.
OTHERS		

1877
July 23.

Limitation—Application to enforce or keep in force a decree—Act IX of 1871, Schedule II, Art. 167.

The application to enforce or keep in force a decree referred to in the Limitation Act (IX) of 1871, Schedule II, Art. 167, Clause IV., is an application made under Section 212, Act VIII of 1859.

MISCELLANEOUS Regular Appeal from an order passed by the District Judge of Hooghly, dated August 28th, 1876.

For Decreeholders, Appellants: *Mr. H. Bell (Legal Remembrancer) and Baboos Aunoda Proshad Banerjee and Sreenath Dass.*

For Judgment-Debtors, Respondents: *Baboos Mohiny Mohun Roy and Juggut Chunder Banerjee.*

The order of the District Judge which was made the subject of appeal was in the following terms :—

The pleader for the debtors brings to my notice that this application for execution is barred by limitation. The decree-holders' pleader state that this objection has already been decided by my predecessor Mr. Lawford. I find that the objection was taken, but that Mr. Lawford has expressed no opinion on it one way or the other. He merely recorded :—The "petitioner admits that the decree is not barred by limitation. The other objections will be heard on 17th July." Now, under the present law, a Court is bound to satisfy itself that it has jurisdiction, and in doing this it is bound to ascertain that the matter under adjudication is not

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*Judgment of
 Lower Court.*

barred by limitation. This can be done at any time before passing final order, but, if Mr. Lawford had decided the point by distinctly recording his own opinion that the matter was not barred, I should have hesitated about having it re-opened, and should have left it to be decided in special appeal. But here it is not so, and therefore I conceive that it is my duty to determine this point, even if it were brought up by the same party. It, however, happens, though this is not very material, that the objection is raised by another of the debtors; but I prefer to take this objection as raised by this Court itself.

It appears that application for execution was made on 21st December 1871, and that notice under Section 216 was issued on 17th January 1872. The next application that was under consideration was made on 22nd February 1875, or more than three years after the issue of notice. It is, therefore, barred by the 5th Clause of Article 167, Schedule 2 of the Limitation Act.

I dismiss the application for execution on these grounds, but under the circumstance without costs. Attachment must be withdrawn.

Against this order an appeal was preferred on the following grounds :—

That, as the District Judge's predecessor had allowed the decree to be executed, he was not competent to re-open the point.

That the District Judge was wrong in his interpretation of Act IX of 1871, Schedule II, Art. 167, Cl. iv.,

That limitation should have been calculated, not from the date of the application to execute the decree made under Section 212, Act VIII of 1859, but from that to sell the debtor's property.

The arguments are sufficiently set forth in the judgment of AINSLIE, J., in referring the case for the opinion of a Full Bench.

AINSLEE, J. AINSLEE, J. :—

On the 22nd February 1875, the decreeholder applied under Section 212, Act VIII of 1859 to put his decree into force.

The Judge below holds that the application must be dismissed

under the Limitation Act, Schedule II, Art. 167, Clause 5, because the last application for execution under Section 212, having been filed on the 21st December 1871, notice under Section 216 was issued on the 17th January 1872, and the time limited for renewing the application is three years commencing from that date.

This appeal is brought to have it determined whether applications subsequent to the 21st December 1871, and in furtherance of the proceedings then set on foot, are not applications to enforce or keep in force the decree.

There was an application for attachment of property made, after issue of notice under Section 216, on 1st February 1872. A writ of attachment was issued on 16th, and returned with certificate of execution on the 28th idem, and on the 29th an order was recorded requiring the judgment-creditor to deposit the costs of proclamation of sale within seven days. Up to this time there was nothing that can, on any construction, come within the meaning of the words, application to enforce or keep the decree in force done within three years next before 22nd February 1875.

The further proceedings were payment into Court of the costs of proclamation of sale by *challan* on the 4th March 1872; order for sale on 20th April, and proclamation accordingly; sale on that date, and application on the following day by the decree-holder to take the sale-proceeds out of Court. This last I cannot hold to be an application to enforce or keep the decree in force. As far as the debtor was concerned, the proceedings had terminated,¹ and the money was held in deposit on account of the decree-holder, who could leave it lying in the treasury or take it out at his own convenience. If this is to be deemed an application within the meaning of the Clause, it is in the power of the creditor to extend his time by not drawing money, which has completely passed from the control of the debtor, and is in fact his own.

There remains the payment of money into Court for the purpose of causing issue of proclamation of sale under the order of 29th February. The first question is, whether this was an application at all; the next, whether it was one to enforce or keep the decree in force.

¹ *Maharaja of Burdwan vs. Lakhoo Money Debts*, 8 W. R., 359; *Juggut Mohanoe Bibee vs. Rasm Chand Ghose*, 9 W. R., 100.

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I think it must be taken that the *challan*, by which money was tendered for the costs of issue of proclamation of sale, when taken in connection with the original application to execute the decree by attachment and sale, and the attachment effected, and order thereupon, was an application to the Court to proceed with the execution of the decree, it is therefore necessary to go on and try the second question.

The learned Legal Remembrancer, who appeared for the appellant, pointed out the difference of the words used in the first and third columns of the Schedule under Article 167. As to the entry in the first column headed "description of application," it is beyond doubt that the words "for the execution, &c., &c.," apply to applications under Section 212. It was contended that, if the words "applying to the Court to enforce" are meant to be restricted to such applications, the language in the third column would have followed the form used in the first column, and have run as follows, or to the same effect, "or (when the application next hereinafter mentioned has been made) the date of applying to the Court under Section 212, Code of Civil Procedure, to enforce the decree, or otherwise applying to keep it in force."

In the parenthesis in the Schedule, the word application is used in the singular, but it is manifest that more than one kind of application is contemplated. The words to keep in force do not apply to an application under Section 212. They may be intended to apply to such applications as those suggested by Mr. JUSTICE MARKBY, in the case in 25 W. R. 546,¹ but with that I am not now concerned. The use of the singular is, therefore, in no way inconsistent with a construction of the words *applying to enforce*, which shall include more than one form of application. Moreover, the absence of such reference to the Section of the Code as occurs in the next following Clause of the same Article, and the change of expression from *application for execution* to *applying to enforce*, may reasonably be presumed to be intentional and to have a purpose, and the construction contended for by Mr. Bell certainly gives effect to the varied form of expression. It cannot be said that the position of the Clauses indicates a restricted construction of the earlier Clause, inasmuch as the later Clause provides for an exten-

¹ *Raja Nilmoney Sing Deo Bahadoor vs. Nilcomul Tappadar.*

sion of time by reference to a proceeding of later date than an application for execution; for this is to ignore the application, to keep in force which apparently may be many months, possibly three years later than either the application to execute under Section 212, or the notice under Section 216.

The law of limitation being a statute in restraint of right must, in case of doubt, be construed favorably to the rights restrained, and it seems to me that any application in furtherance of an application to put a decree into execution may be held to be an application to enforce the decree. If it becomes necessary to apply to the Court to take some further step in execution proceedings already started, that is, really an application to enforce.

The reported cases on this Article of the Schedule brought to my notice are not numerous; and of these only two directly bear upon the present question. These are the cases in 23 W. R., 282,¹ decided by JACKSON and McDONELL, J.J., and in 25 W. R., 546², by MARKBY and McDONELL, J.J.

The other cases brought before me were the following :—

21 W. R., 309³; 22 W. R., 512⁴; 23 W. R., 183⁵; 24 W. R., 227⁶; 25 W. R., 94⁷; 1. L. R. *Bombay* 59.

I will examine these. First, 21 W. R., 309,³ decided by COUCH, C.J., and JACKSON, J. This case only decides that, as the application relied on was not an application under Section 212, it did not serve to keep the decree in force.

It was said that the provision in Article No. 167 must be held to require an application to be in accordance with Section 212. That is the least that must be done, supposing that the decisions about *bona fides* should be held to be not applicable now.

All that can be gathered from the report is, that the decree-holder was probably relying on some informal application for execution, and not on an application following and subsidiary to a

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¹ *Faiz Buksh Chowdhry vs. Sadut Ali Khan.*

² *Raja Nilmony Sing Deb vs. Nilcomul Tuppadar.*

³ *Gowree Sunkur Tribedee vs. Arman Ali Chowdhry.*

⁴ *Eshan Chunder Bose vs. Prannath Nag*, also reported in 14 B. L. R., 143.

⁵ *Baboo Pyaroo Tukobildarinee vs. Syud Nazir Hossin.*

⁶ *Shaikh Subhan Ali vs. Shaikh Sufdar Ali.*

⁷ *Abdool Hakeem vs. Shaikh Aseatoollah.*

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regular application under Section 212. The report does not state the facts. But this is the view of the case taken in the Bombay case, to be referred to hereafter.

The next case reported in 22 W. R., 512,¹ was decided by a Full Bench. The case was referred to a Full Bench by JACKSON and McDONELL, J.J. In the referring order Mr. JUSTICE JACKSON, said that it had been pressed on them that because every application made after the period of limitation prescribed for it must fail; therefore, conversely, every application made within that period is a good application to stop limitation running; and that another Bench (MARKBY and MITTER, J.J.) had held that this is now the law, and that all questions of *bona fides* are excluded. Pointing out the resulting unlimited delays that might be brought about, he asked for a decision in the question whether the law, as it now stands, excludes questions of *bona fides*. The Full Bench unanimously held that the provisions of the present law are absolute and irrespective of any question of *bona fides*. I may observe (though it refers more properly to an earlier part of this order) that Mr. JUSTICE JACKSON expressly rests his judgment on the ground that the silence of the Legislature on the question of *bona fides* must be taken to have been intentional.

The next case cited, 23 W. R., 183,² is scarcely connected with the present question in any way, and I shall pass it by as immaterial.

The case reported in 24 W. R., 227,³ is also unimportant. Apparently there was nothing which could be called an application after the issue of notice under Section 216 on the 15th April 1871 up to 20th July 1874, when the fresh application for execution was put in, though the former case was not struck off the file till 24th August 1871.

25 W. R., 94,⁴ MACPHERSON and MORRIS, J.J.:—

The former application was on 31st October 1868; notice was issued, 20th November 1868, and the new application was on

¹ *Eshan Chunder Bose vs. Prannath Nag*, also reported in 14 B. L. R., 143.

² *Baboo Pyaroo Tahobildarinee vs Syud Nasir Hosein*.

³ *Shaikh Subhan Ali vs. Shaikh Sufdar Ali*.

⁴ *Abdool Hakeem vs. Shaikh Asatoollah*.

28th November 1871. A petition of 12th December 1868 was relied upon as sufficient to save the case from the operation of the Statute, but this was rejected on the ground that the decree-holder did not thereby apply to enforce execution; he simply prayed that the matter of the execution applied for on 31st October 1868 should be disposed of along with an application for an execution he had made in another suit.

I. Indian Law Reporter, *Bombay*, 59.

The last application for execution was on February 1868, the proceedings thereon lasted till 10th September 1871, when they were brought to a close by an order setting out that all the money due had been received, except Rs. 20-13-3, which there was then no prospect of realizing. On the 30th September 1871 a petition was put in, which was afterwards relied on as bringing the next application for execution made on 19th October 1872 within time. The Court citing the Calcutta case in 21 W. R., 319, held that it was not an application to execute at all, and was itself out of time.

I now come to the two cases directly on the question before me. The second merely follows the first, and it will be convenient to notice it first.

In 25 W. R., 546¹ (MARKBY and McDONELL, J.J.) :—

The application to execute was made on 29th December 1873; the last previous application was on 10th September 1870; a notice under Section 216 issued on this, the date is not given, but it seems to have been admitted that it was not within three years. It was suggested that further proceedings might have been taken, but this was not enquired into. Mr. JUSTICE MARKBY, in delivering judgment said :—"The case in 23 W. R. decides that under the new law of limitation when proceedings have been had subsequent to the application to execute the decree and to the issue of notice, limitation does not run from the date of any such subsequent proceedings, but only from the date of the first application to execute the decree, or from the notice, as the case may be, that is a decision of Division Bench of this Court in which Mr. Justice McDONELL was a party, and I should not feel justified in departing from it."

This brings me to the last case to be noted, the one in 23 W. R.,

¹ *Raja Nilmony Singh Deo vs Nilcomul Tuppadar.*

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282¹ (JACKSON and McDONELL J.J.) which governed the case just cited.

The application before the Court was in September 1873, the last proceeding one in August 1870 ; it was urged that under that application proceedings had been taken, property sold and money recovered, but it was held that "the Act does not allow limitation to run from the date of such proceedings, but only from the date of the application."

Why the Court held the applications to enforce a decree mentioned in Art. 167, Clause 4, to be limited to applications under Section 212, is not stated.

That the decisions, as far as they go, run one way must be admitted, but the principle of construction has been discussed in none of them ; and with the greatest respect for the opinion of my learned brother Markby, I think I shall not be uselessly wasting the time of the Court by placing the question which it is of immense importance to get finally settled before a Full Bench.

The applications I refer to as subsidiary, and in furtherance of the enforcement of a decree, and which appear to me to be applications to enforce within the meaning of Clause 4, Art. 167, are such applications as for attachment after issue of notice, for proclamation of sale after attachment, for further proclamation after temporary stay of proceedings : in short, all applications, the expressed purport of which is to procure something to be done by the Court which is necessary to carry into effect, give force to, or enforce the primary application for execution under Section 212. I use the words *expressed purport* designedly to avoid any doubt, whether I am not coming into conflict with the Full Bench decision in 22 W. R., 512. I do not mean to raise any question of the *bona fides* of the petitioning decree-holder. If the terms of any application subsidiary to, and in furtherance of, an application under Section 212 set out and ask for something which is material to the progress of the execution, as at present advised. I believe it to be a sufficient application under the limitation law.

The question then may be stated in the following terms. Un-

¹ *Faiz Buksh Chowdhry vs. Sudut Ali Khan.*

der the terms of Clause 4, Art. 167, Schedule II of the Limitation Law, is not an application to the Court to have something done for the purpose of carrying on and giving effect to a pending application for execution of a decree made under Section 212 of the Code of Civil Procedure an application from the date of which a fresh period of limitation runs?

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It is scarcely necessary to say as the order of reference implies it that in my opinion the question of limitation was open for consideration by the Judge, that an admission by one of two co-debtors could not operate to prevent his giving effect to Section 4 of the Limitation Law.

MORRIS, J. :—

MORRIS, J.

I think that the question raised by my learned colleague as to the effect of Clause 4, Art. 167, Schedule II of the Limitation Act, should very properly be referred for the decision of a Full Bench of this Court.

The judgment of the FULL BENCH' was delivered by

GARTH, C.J. :—We are of opinion that "applying to enforce the decree" in Art. 167 means the application (under Section 212, Code of Civil Procedure or otherwise) by which proceedings in execution are commenced, and not applications of an incidental kind made during the pendency of such proceedings.

But we also think that some meaning must be given to the alternative expression "keep in force," occurring in the same Article, and that consequently in cases governed by Act IX of 1871 a decree-holder, who has applied to the Court *simpliciter* "to keep the decree in force," may, within three years from the date of such last-named application, obtain execution of his decree.

AINSLIE, J. :—

AINSLIE, J.

I accept the decision of my learned colleagues as the proper answer to the question put.

¹ GARTH, C.J., JACKSON, MACHFARSON, MARKBY and AINSLIE, J.J.

1877 GARTH, C.J. :—

CHUNDER
COOMAR ROY
AND OTHERS

The case will be sent back to the Division Bench for disposal.

BHOGOBUTTY
PROSUNNO
ROY AND
OTHERS.

Note.—Act IX of 1871 has since been repealed. The present law of limitation (Act XV of 1877) Schedule II., Art. 179, Clause IV, declares that limitation in such cases shall begin to run from the date of applying in accordance with law to the proper Court for execution, *or to take some step in aid of execution*, of the decree or order. Section 230 of the New Code of Civil Procedure (X of 1877) lays down some special rules for limitation in the execution of decrees which should not be overlooked.

[CIVIL APPELLATE JURISDICTION.]

[FULL BENCH.]

MOHESH MAHATO AND ANOTHER DEFENDANTS,
 AND
 SHEIKH PEEROO PLAINTIFF.

1877
 July 20.

Special Appeal.—Act XXIII of 1861, Section 27—Question of title incidentally tried.

The fact that a question of title to immoveable property may have been incidentally tried does not give a right of Special Appeal in a case cognizable by a Small Cause Court for a matter valued at less than 500 rupees.

SPECIAL Appeal from the judgment of the Deputy Commissioner of Hazaribagh, dated the 18th March 1875, affirming that of the Extra Assistant Commissioner, dated the 15th December 1874.

For Defendants, Appellants : *Baboo Roop Nath Banerjea.*

The case was referred to a Full Bench by MARKBY and PRINSEP, J.J., in the following terms :—

We are of opinion that this is a suit for damages under Rs. 500, and as such it is cognizable by a Court of Small Causes under Section 6 of Act XI of 1865.

It is contended, however, for the appellants, that a special appeal is not barred by Section 27 of Act XXIII of 1861, inasmuch as a question of title to land was raised and tried in the suit.

This contention of the appellant is contrary to the decisions reported in the 3 B. L. R., 96 *App.*, and 10 W. R., 78.

There are, however, two decisions of this Court which support this contention. One is reported in 4 W. R., 60, and the other in 15 W. R., 557. These two decisions are also supported by two decisions of the High Court of Bombay (2 Bo. 4, and 6 Bo. 12).

¹ Since repealed. See s. 586, Act X of 1877.

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 MOHESH MA-
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 ANOTHER
 v.
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 PERBOO.
 —

The question is one of importance, and we therefore refer it to a Full Bench. The question is whether, having regard to the provisions of Section 27 of Act XXIII of 1861, a special appeal lies to this Court in a suit of the nature cognizable by a Court of Small Causes, where a question of title to immoveable property has been raised and tried in the Courts below.

The judgment of the Court¹ was delivered by

GARTH, C.J.

GARTH, C. J.—We are of opinion that, as this was a suit cognizable by the Court of Small Causes, no special appeal lies to this Court, although a question of title may have been incidentally raised in it.

The appeal will, therefore, be dismissed.

¹ GARTH, C.J., JACKSON, MACPHERSON, MARKBY, and AINSLIE, J.J.

[CIVIL APPELLATE JURISDICTION.]

[FULL BENCH.]

GOBIND CHUNDER KUNDU AND OTHERS . PLAINTIFFS ;
 AND
 TARUK CHUNDER BOSE AND OTHERS . . . DEFENDANTS.

1877
 September 12

Res. Judicata—Suit to reopen issue decided on intervention of third party in a suit under Act VIII (B. O.) of 1869 (Bengal Rent Law).

T. sued for arrears of rent on a specific share of a tenure. G. intervened, denying T.'s right and title, and claiming the right to receive the entire rent. An issue was then tried whether T. was entitled to receive the rent claimed as against G. *Held*, that the question of title having been determined, G. could not sue to reopen the same matter.

SPECIAL Appeal from the judgment of Baboo Srinath Roy, Subordinate Judge of Furridpur, dated 14th February 1876, affirming that of Baboo Unnoda Nath Mozumdar, Munsiff of Bhanga, dated the 6th July 1875.

For Plaintiffs, Appellants : *Baboo Obhoy Churn Bose.*

For Defendants, Respondents : *Baboo Bungshidhur Sen.*

This case was referred to a Full Bench by GARTH, C.J., and ROMESH CHUNDER MITTER, J., in the following terms :—

This is a suit brought by the plaintiffs to recover possession of a one-anna share of a certain jote.

In the year 1871, the plaintiffs claimed to be entitled to a fifteen-annas share of the said jote, and the defendant No. 1 to a one-anna share thereof.

In that year the superior landlord of the jote sued some persons, other than the defendant No. 1, for rent of the entire jote, and obtained a decree against them, under which the said tenure was put up for sale and purchased by the defendant No. 4, who again sold the same share to all the plaintiffs in the name of the plaintiff No. 1.

The defendant No. 1 then brought a suit, No. 1174 of 1872,

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 GOBIND
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 AND OTHERS.

Case stated.

GARTH, C.J.

for arrears of rent of the one-anna share against the occupying tenant of the jote, Mohun Chunder Das, in which suit the plaintiff No. 1 intervened as a defendant upon the ground that he, and not the present defendant No. 1, was entitled to the rent claimed.

Thereupon the question was raised in that suit whether the then plaintiff (the defendant No. 1), or the then defendant (the present plaintiff No. 1) was entitled to the rent as owner of the one-anna share, and that question was adjudicated upon and decided against the present plaintiff.

The intervening defendant in that case (the present plaintiff No. 1) claimed to be the owner of the entire jote by virtue of the said sale to him on behalf of all the present plaintiffs, and the only question in this suit is, whether the plaintiffs (by virtue of that sale) are the owners of the one-anna share of the jote as against the defendant No. 1, the plaintiff in the former suit.

Both the Lower Courts have held that the plaintiffs are barred by the judgment in the former suit, (by virtue of Section 2, Act VIII of 1859)¹ upon the ground that the selfsame question, which was there raised and decided, is also raised in this suit.

The question has now come before us on special appeal; and as there appear to be conflicting decisions of this Court upon it, (see *Mussumat Sushibuth Koer vs. Sheik Mubbud Ali*, 24 W. R., 44; *Mohima Chunder Mozumdar vs. Asradha Dassia*, 21 W. R., 207; *Deoki Nundun Roy vs. Kali Prosad and others*, 8 W. R., 366), and as the point is one of general importance, we think it right to refer the question to a Full Bench.

The question is, whether, under the circumstances stated, the plaintiffs are barred by the judgment in the former suit.

The judgment of the Court² was delivered by
 GARTH, C. J. :—

GARTH, C. J. I am of opinion that in this case the plaintiffs are barred by the former judgment.

¹ Since repealed—the law on the subject being now contained in Section 13, Act X of 1877.

² GARTH, C.J., JACKSON, MACPHERSON, MARKBY, and AINSLIE, J.J.

It is to be observed that the present suit is not to recover *khas* possession of the property in question. The land is in the occupation of a tenant; and the plaintiffs' only object is to establish their title to it as against the defendant No. 1.

We have, therefore, to see whether the right and title, which is subject of claim in this suit, was not the very same right and title which was in issue between the same parties, and determined in the former suit.

When once it is made clear that the selfsame right and title was in issue in both suits, the precise form in which the suit was brought, or the fact that the plaintiff in the one case was the defendant in the other, becomes immaterial.

Now, in this instance, the plaintiff in the former suit is the same person as the defendant No. 1 in this; and he sued to recover from the occupying tenant the rent of the property now in dispute. In that suit one of the present plaintiffs (representing and claiming the same right under the same title which is now claimed by all the plaintiffs), intervened as a defendant; and he resisted the then plaintiff's claim to the rent, upon the ground that he (representing the present plaintiff's interest) was entitled to it as the owner of the property.

An issue was accordingly framed in that suit, as to whether the then plaintiff (the present defendant No. 1) was entitled to the rent as owner of the property in question, as against the then defendant who represented the present plaintiffs. This question was contested between them in that suit upon the same title and materials which are now brought forward in the present suit; and the only difference is, that the plaintiff in that suit is the defendant in this.

On the other hand, it is argued by the appellant that the claim in the former suit was *for rent against the tenant*; that the only issue in that case was whether the plaintiff was entitled to that rent; and that the question of title raised by the intervening defendants was only incidental to the main issue. But, as between the plaintiffs and the intervening defendant the question, and the only question, was that of title, and as the defendant in that suit chose to intervene and to raise that question between himself and the

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AND OTHERS.

—
Judgment.

—
GARTH, C.J.

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 AND OTHERS.

plaintiffs, he, and those whom he represented, must take the consequences of their intervention.

Our decision in this case will be found entirely in accordance with the views expressed by the Full Bench in the case of Huru

Sunkur Mookerjee vs. Kristo Pattro and others, 24 W. R., 154.

—
Judgment.

The appeal will be dismissed with costs.

—
 GARTH, C.J.

[CIVIL APPELLATE JURISDICTION.]

[FULL BENCH.]

MUSSUMAT LAKHESSUR KOER PLAINTIFF; 1877
September 12.
AND
SOOKHA OJHA DEFENDANT.

Bengal Legislative Council, Power of—Special Appeal in rent suits—Act VIII (B. C.) of 1869, Section 102.

Held (L. S. JACKSON, J.J., *dis.*)—That there is no right of Special Appeal in the cases specified in Section 102, Act VIII (B.C.) of 1869.

Per GARTH, C.J. and MACPHERSON and MARKBY, J.J.—That this matter has been settled by a Full Bench (*Brojo Misser vs Mussumat Ablakes Musrain*, 21 W. R., 320; 13 B. L. R., 376;) and a long course of decisions which should not be disturbed.

Per GARTH, C.J.—That otherwise there is a right of Special Appeal, the Bengal Legislation having acted *ultra vires* in enacting Section 102, Act VIII (B.C.) of 1869.

Per L. S. JACKSON, J.—That there being the right of Special Appeal, no course of decisions can affect it.

Per MACPHERSON and MARKBY, J.J.—That it is not for the Court now to consider the matter, which if, wrongly decided, can only be rectified by the Legislature of the Government of India.

Per AINSLIE, J.—That the Bengal Legislature by enacting Section 102, Act VIII of 1869, did not act *ultra vires* because it did not touch any right of Special Appeal in rent suits then subsisting.

SPECIAL APPEAL from the judgment of the Judge of Sarun, dated 13th March 1876, reversing that of the Moonsiff of Chum-parun, dated 18th December 1875.

For Plaintiff, Appellant : *Baboo Sreenath Banerji.*

For Defendant, Respondent : *Baboo Doorga Persaud.*

This case was referred to a Full Bench by L. S. JACKSON and WHITE, J.J., on 10th May 1877, with the following observations :—

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L. S. JACKSON, J. :—

MUSUMAT
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v.
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OJHA.

Case stated.

L. S. JACK-
SON, J.

This is an Appeal against a judgment of the District Judge of Sarun, made on Appeal against an original judgment of the Moonsiff of Chumparun in a suit by the plaintiff for recovery of Rs. 52 and annas 9, principal with interest, being arrears of rent.

The Judge having reversed the decision of the Moonsiff, the Plaintiff comes before us, on Special Appeal, and objection is taken on behalf of the Respondent that, under the provisions of Section 102 of Act VIII (B.C.) of 1869 no Second Appeal to this Court will lie, the suit being a suit for rent in which no question "of right to enhance or vary the rent of a ryot or tenant, or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto, has not been determined by the judgment."

This Section will undoubtedly apply, and inasmuch as the judgment is one which, unless restricted by any provision of law, we should certainly reverse, it is impossible to avoid, considering the question whether the Special Appeal is in fact taken away by the Section referred to.

The Pleader for the Respondent, having submitted his objection, has not thought fit to support it by any argument, and has left it to us to dispose of without any assistance from him.

This matter is not new, because unquestionably numbers of appeals to this Court have been dismissed on this ground—the Division Benches before which the appeals came having considered the Section a valid bar to special appeal. As at present advised, I myself and my brother White are, both of us, inclined to think that the Section does *not* take away the appeal to this Court. But, as the contrary opinion has been repeatedly acted upon by this Court, we are bound to refer the case to a Full Bench; and, as the matter will be fully argued there, it is only necessary to state briefly the reasons which make us think that the appeal is not taken away by the Section in question.

The authority of this Court to entertain Special Appeals, and the right of suitors to prefer such appeals, is provided for by Section 372 of the Civil Procedure Code, Act VIII of 1859, which provides that "a Special Appeal shall lie to the Sudder Court from all decisions

passed in Regular Appeal by the Courts subordinate to the Sudder Court, on the ground of the decision being contrary to some law or usage having the force of law, or of a substantial error or defect in law or the procedure in investigating of the case which may have produced errors or defect in the decision of the case upon the merits."

The Court which heard the Regular Appeal in the case now before us is the Court of the District Judge, which is unquestionably a Court subordinate to the High Court, and, therefore, a Special Appeal will lie unless any law for the time being in force provided otherwise. The provision relied on as taking away the Special Appeal is Section 102 of Act VII (B. C.) of 1869. Now, that Section does not in express terms take away this power of Appeal, for it says: "Nothing in this Act contained shall be deemed to confer any power of appeal in any suit tried and decided by a District Judge originally or in appeal, if the amount sued for, or the value of the property claimed, does not exceed one hundred rupees, in which suit a question of right to enhance or vary the rent of a ryot or tenant, or any question relating to a title to land, or to some interest in land as between parties having conflicting claims thereto, has not been determined by the judgment."

I am clear that the Special Appeal given generally by Section 372 of Act VIII of 1859, cannot be taken away by implication, but by express provisions restricting the general right, and even if we were of opinion that the Bengal Legislature intended to take away any right of Special Appeal, the question would arise whether the Legislature, under the power conferred on it by the Statute of 1861, could take away the jurisdiction of this Court.

Now, in the very important case lately decided by this Court, (*The Queen vs. Burah* and another), it was, I think, conceded on behalf of the Crown, and assumed in the judgments delivered by the learned Judges, that the only authority which could take away the jurisdiction of the High Court was with the Governor-General in Council.

It was suggested by the vakil for the appellant in this case that the class of suits to which this appeal belongs is a special class, relating to special subjects, and that it was the creation of the

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Case stated.

JACKSON, J.

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 Case stated.
 JACKSON, J.

Bengal Legislature, and that therefore the right of appeal would not exist unless it was expressly provided for by the Legislature which created it.

Suits for rent have been within the cognizance of Courts in British India ever since, I believe, the foundation of that Empire, and between the years 1799 and 1859, subject to a double jurisdiction, that is to say, to the Court of the Collector, and then, by a sort of Appeal, to the Civil Court. By the Act of 1859 the double jurisdiction was abolished, and then suits for rent became cognizable by the Revenue Courts alone. But the Act (X) of 1859 made the orders of the Revenue Courts, and also of the District Courts subordinate to them, subject to final appeal by the Sudder Court, and this Court, when established undoubtedly inherited the jurisdiction of the Sudder Court. The effect of the later enactment, Act VIII (B. C.) of 1869, has been to throw rent-suits into the great mass of litigation cognizable by the Civil Courts under the first section of the Civil Procedure Code.

The present suit, therefore, being cognizable by the Civil Court, and being heard in appeal by a Court subordinate to the High Court, there is, I apprehend, nothing in Section 102 of the Bengal Act to take away the right of appeal, and such right can only be restricted by competent legislative authority.

This view is not new to me. I have often considered it, and in the case reported in 21 W. R., 320, these doubts were intimated in these words in my separate judgment: "For these reasons I think that whatever exemption from appeal is conferred by that Section is limited to the decisions of District Judges," in saying that I left myself free for the future consideration of this question.

For these reasons I think that the efficacy of Section 102 ought to be referred for the decision of a Full Bench.

WHITE, J. WHITE, J. :—I concur.

The following judgments were accordingly delivered by the Judges composing the Full Bench.¹

AINSLIE, J. AINSLIE, J. :—

By 24 and 25 Vic., Cap. 104, Section 9, the High Court

¹ GARTH, C.J., JACKSON, MACPHERSON, MARKBY and AINSLIE, J.J.

is vested with all powers and authorities that may be conferred on it by Her Majesty's Letters Patent, and subject to the legislative control of the Governor-General in Council, with all the then existing powers of the Sudder Dewany Adawluts.

By Section 15 of the Letters Patent of 1862, this Court was constituted a Court of Appeal from the Courts from which there was then an appeal to the Sudder Dewany Adawlut, and was directed to exercise jurisdiction in *such cases* as were then subject to appeal to the Sudder Dewany Adawlut by virtue of any existing law, or which might thereafter be made subject to appeal by any law or regulation made by the Governor-General in Council.

By Section 16 of the Letters Patent of 1865 this Court is constituted a Court of Appeal from all Courts subject to its superintendence; and directed to exercise Appellate Jurisdiction in such cases as were then (in 1865) subject to appeal to it by virtue of any law or regulation then in force.

In 1861, 1862 and 1865 alike, there was at least one class of suits in which the Sudder Dewany Adawlut, or the High Court, had no power to interfere on special appeal, namely, the class of rent-suits falling within the provisions of Section 153, Act X of 1859. This Court neither inherited a power to interfere in such suits from the Sudder Dewany Adawlut, which had not got it, nor took it as a new power under the first or second Letters Patent.

The words of the first Charter, "in such cases as are subject to appeal to the said Court of Sudder Dewany Adawlut," distinctly limit the appellate power of this Court.

Under the second Charter it can only be held that it gives a power of dealing in appeal with the class of cases now under consideration if it was given by the laws in force in 1865. The general law of appeal was Section 23, Act XXIII of 1861, but this general law was rendered inoperative in certain cases by Section 153, Act X of 1859, and, as by this law there was no fresh appeal in certain cases, the Special Appeal, Section 372, Act VIII of 1859, had nothing to operate upon.

By Section 33, Act VIII of 1869 (Bengal Council) the jurisdiction of the Collectorate Courts was brought to an end, and all suits theretofore triable in such Courts were made triable by the ordinary Civil Courts, and by the next Section (34) it was provided

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—
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—
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Judgment.

AINSLIE, J.

that the procedure was to be regulated by the Code of Civil Procedure, save as in this Act might be otherwise provided.

The 102nd is one of those Sections in which a different procedure is provided, and therefore unless Section 34 can be got rid of, there can be no Special Appeal.

It seems to me that Section 372, Act VIII of 1859, does not over-ride Section 34, Act VIII of 1869 (Bengal Council).

In order to introduce Section 372, Act VIII of 1859, it must be held that the provisions of Section 153, Act X of 1859, were based on the constitution of the Court from whose judgment the Appeal was taken away, and not on the character of the suits in which it was forbidden.

Such a view seems to me to be distinctly negated by Section 27, Act XXIII, 1861, as to which there can be no doubt that the character of the suit is the foundation of the law.

But, if the limitation of Appeals established by Section 153, Act X of 1859 of the Governor-General in Council, affected suits, and was not in respect of Courts, then Section 372 is as much qualified by Section 153, Act X of 1859, as it admittedly is by Section 27, Act XXIII of 1861, and the change of *forum* introduced by Act VIII of 1869 has not the effect of removing the qualification.

Section 34, Act VIII of 1869, as carried out by Section 102, left the jurisdiction of this Court intact, and is therefore not open to the objection that no legislative power, except that of the Governor-General in Council, can alter the jurisdiction of this Court.

If I entertained any doubt on the subject, I should feel bound, by the long-established and never-before-questioned (as far as I know) practice of the Court.

MACPHER-
 SON, J.

MACPHERSON, J.:—

In my opinion the questions which have been referred to us are concluded by the uniform course of the decisions of this Court ever since Act VIII (B. C.) of 1869 came into force, and cannot now be re-opened.

Many thousands of suits under this Act have been disposed of annually; and this Court has never, in any one of the numerous appeals which have come before it in these suits, doubted the power of the Bengal Council to pass the Act. If the uniform

course of our decisions during these many years is wrong, it seems to me that it is a matter for the Legislature, and that it is too late for us now, for the first time, to say that the Act was made without jurisdiction, in so far as it touches the High Court as regards the right of appeal or otherwise.

As to the particular issue arising in Section 102, it seems to me also to be concluded by the numerous decisions of the Court (all taking the same view of the law) ending with the Full Bench case of *Brojo Misser*, which was heard in March 1874 (21 W. R., 320; 13 B. L. R., 376). The question in that case was whether an Additional Judge was a District Judge within the meaning of Section 102. The majority of the Court held that he was, and there that under that Section no appeal lay. Mr. JUSTICE JACKSON held that he was not, and therefore that the appeal did lie. But the report of that case does not shew that any of the Judges doubted the effect to be given to Section 102, or conceived that, in cases falling within that Section, there could be any appeal from the decision of the District Judge.

I consider that the matter referred to us has already been settled¹ by these cases.

MARKBY, J. :—

I concur in the judgment of MR. JUSTICE MACPHERSON.

L. S. JACKSON, J. :—

In answering on my part the question referred to the Full Bench, I have little to add to the reasons which I gave in referring this case. These reasons, to my thinking, have not been answered. It is suggested that the question raised here has been

¹ For Example :—

Doyal Chand Sahai vs. Nobin Chunder Adhikaree, 16 W. R., 235; 8 B. L. R., 180.

Eshwar Chunder Sen vs. Bipin Beharee Roy, 16 W. R., 61, 132; 8 B. L. R., 188.

Moonshee Mahomed Manoor Meer vs. Sreemuttee Jaibunna, 19 W. R., 200; 10 B. L. R., 29, App.

Poorno Chunder Roy, vs. Krishto Chunder Singh, 23 W. R., 171.

Nobokrishto Coondoo vs. Nasir Mahomed Sheikh, 19 W. R., 201; 10 B. L. R., 30, App.

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 ———
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 ———
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virtually decided by a long course of practice, and also by the ruling of the Full Bench in the case of Brojo Misser against Mussamut Ablakhi Misrain,¹ and that we ought not, whatever our view might have been, if the question were now raised for the first time, to disturb such a course of practice. It seems to me that although it is extremely desirable to maintain a long-settled ruling in regard to matters on which the security of titles depends, or even when to arrive at a contrary decision would disturb the practice of inferior Courts, it is not necessary to do so in the present instance, where no man's title can be affected, nor can any possible inconvenience arise by the mere admission of the present appeal. It seems to me that, in the first place, the question has not been expressly raised and decided by a Full Bench; secondly, that, if, as I think, the law allows an appeal, we are not competent to deprive the Appellant of his right merely out of deference to the practice of the Court; and, thirdly, that to persist in an error merely because that mistake has been committed for several years, is a course in which I am not prepared to concur. I would admit this Special Appeal.

GARTH, C.J. GARTH, C. J. :—

But for the long course of practice, which has prevailed in this Court since the year 1869, and the Full Bench decision in the case of Brojo Misser *vs.* Mussamut Ablakee Misrain and others,¹ I should have been disposed to hold, with Mr. JUSTICE JACKSON, that a special appeal lay in a case like the present.

But I think it so extremely important, that the rules of law prescribed by this Court should be settled and uniform, that I am unwilling to disturb a course of practice which, as it seems to me, has been confirmed by a Full Bench decision.

It is true, that in that case the point now before us was not directly argued, because apparently it was not considered arguable, but the decision of it appears to me to have been involved in the Full Bench judgment, because the Court there held that under circumstances similar to the present, a special appeal does

¹ 21 W. R., 320; 13 B. L. R., 376.

not lie from an Additional Judge to this Court any more than from a District Judge.

That ruling does not, in my opinion, virtually determine the question now referred to us.

The Special Appeal will, therefore, in conformity with the judgment of the majority of the Court, be dismissed with costs.

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OJHA.Judgment.GARTH, C.J.

[CRIMINAL REVISIONAL JURISDICTION.]

1877
July 6.IN THE MATTER OF OKHIL CHUNDER }
BISWAS } PETITIONER.*Sections 491, 494, Code of Criminal Procedure—Evidence taken before party concerned—Section 530—Proceeding necessary.*

A proceeding under Section 530 Code of Criminal Procedure, must be recorded by the Magistrate stating the grounds of his being satisfied of the existence of a dispute regarding land, &c., likely, to induce a breach of the peace, before he can order a person to be retained in possession thereof.

A Magistrate cannot bind over a person to keep the peace unless he has adjudicated on evidence taken in the presence of that person that a breach of the peace is probable. If such person fails to attend on a summons duly served, a warrant should issue (Section 494); the order for security cannot be passed *ex parte*.

THIS was a case referred under Section 296 of the Code of Criminal Procedure by the Session Judge of Chittagong for the orders of the High Court as a Court of Revision.

On the report of a Police Officer that a breach of the peace was imminent regarding certain land, the Magistrate issued a summons under Section 491 of the Code of Criminal Procedure, and on the non-appearance of the party summoned proceeded to order him to furnish certain security to keep the peace, and he also directed the opposite party to be retained in possession of certain land in dispute until ousted in due course of law.

The judgment of the High Court¹ was delivered by

PRINSEP, J. PRINSEP, J. :—

The order of the Magistrate demanding security to keep the peace from Okhil Chunder, and directing Sarut Chunder to be retained in possession of the disputed land must be set aside, because it was passed in the absence of Okhil Chunder (see Sections 494, 496) and because no proceedings had been taken under Section 530, Code of Criminal Procedure.

¹ ROMESH CHUNDER MITTER and PRINSEP, J.J.

[PRIVY COUNCIL.]

DEENDYAL LAL DEFENDANT,
 AND
 JAGDEEP NARAIN SINGH PLAINTIFF.

1877
 July 25.

*Mitacshara—Joint Hindoo family—Execution of decree—Sale of share
 of one member—Purchaser can compel partition.*

Even if a member of a joint Hindoo family living under Mitacshara law cannot encumber his share in the joint property without the consent of his co-sharers, where he has contracted a lawful debt, the creditor can enforce his decree by selling the right and interest of the debtor, but though the purchaser acquires a lien on the property to that extent, he can only compel the partition which the debtor might have compelled, had he been so minded, before the alienation of his share took place.

Full Bench judgment of the Calcutta High Court, 12 W. R., 1 F. B. ; 3 B. L. R., 31, F. B., *Sudaburt Persad Singh vs. Phoolbush Koer*, explained.

The rule in Bengal is thus made similar to that in Madras and Bombay.

THIS was an appeal from the judgment of the Calcutta High Court (PHEAR and AINSLIE, J.J.) which is reported in 20 W. R., 174; 12 B. L. R., 100.

The facts of this case are fully given in the following judgment of the Privy Council:—¹

The respondent in this case is the only son of one Toofani Singh, and the family being governed by the law of the Mitacshara, is joint in estate, in the strict sense of the term, with his father. On January 28th, 1863, the father being indebted to the appellant to the amount of Rs. 5,000, executed to him a Bengali mortgage bond for securing the repayment of that sum, with interest at the rate of 12 per cent. per annum. The appellant afterwards put this bond in suit, and on May 30th, 1864, obtained a decree against Toofani Singh for the sum of Rs. 6,328-13-8.

¹ SIR JAMES W. COLVILLE, SIR BARNES PHACOCK, SIR MONTAGUS E. SMITH, SIR ROBERT P. COLLIER.

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He took no proceedings to enforce this decree, which was in the form of an ordinary decree for money, against the property especially hypothecated; but in September 1870 caused "the rights and proprietary and mokurruri title and share of Toofani Singh, the judgment-debtor" in the joint family property, which is the subject of this suit, to be put up for sale in two lots for the realization of the sum of Rs. 11,144-6-4, the amount alleged to be then due on the decree; and himself became the purchaser of those lots for the sums of Rs. 900 and 10,100. Objections were taken to this sale by the judgment-debtor, which, after going through all the Courts, were finally overruled, and the appellant obtained the usual certificate title, and in January 1871 succeeded in taking possession thereunder of the whole of the property now in dispute. Thereupon, in February 1871, the respondent brought the suit, out of which this appeal arises, for the recovery of the whole property on the ground that, being according to the law of the Mitacshara, the joint estate of himself and his father, it could not be taken or sold in execution for the debt of the latter, which had been incurred without any necessity recognized by the shastras or the law. The father was joined as a defendant.

The issues on the merits settled in the cause were—

1. Did Toofani Singh borrow money from the defendant (the appellant) under a legal necessity or without a legal necessity? And are the auction sales and other proceedings taken in satisfaction of the debt all illegal, and ought they to be set aside or not?
2. Under the Mitacshara law, is the plaintiff entitled to the entire property sold in satisfaction of his father's debts, or to how much?
3. Was some portion of Mouzah Domawun personally acquired by the plaintiff's father, or was it acquired by the ancestral funds and property?

A good deal of evidence was given in the Court of first instance as to the nature of the debt incurred by Toofani Singh, and upon the issue whether it was borrowed under a legal necessity. Upon the face of the bond the debt is ostensibly that of the father alone; there is no statement that the money was borrowed for the purposes of the joint family, or so as to bind

co-sharers in the estate. The oral evidence adduced by the plaintiff was directed to show that his father, who had passed five years in jail on a conviction for forgery, had both before and since his imprisonment lived an immoral and disreputable life, not residing with and rarely visiting his family; and that the money was borrowed on his sole credit, and spent by him in riotous living. On the other hand, the defendant (the appellant) brought witnesses to prove that part at least of the money, *viz.*, Rs. 1,500, was expressly borrowed in order to provide for the marriage expenses of one of the daughters of the family; and, generally that the plaintiff was cognizant of his father's transactions, and the whole debt one which bound co-sharers.

The Subordinate Judge does not appear to have thought it necessary to come to any definite conclusion upon this issue. In one passage of his judgment he says:—"The sale being held by the Court, it is unnecessary to see whether it was held under a legal necessity or not." In another passage he says:—"The sale held by the Court, according to the laws in force of the ancestral estate, as the rights and interests of the judgment-debtor, cannot be regarded as including the right of the son of the judgment-debtor which he derived under the shastras; and so far as the plaintiff's share is concerned, the sale cannot be confirmed." This seems to be the ground on which he proceeded; for he gave the plaintiff a decree for one moiety of all the property claimed, except a small portion which he held was the separate acquisition of the father.

On appeal this decree was reversed by the Zillah Judge of Gyah, who dismissed the suit on the ground (amongst others) that a legal necessity to borrow the money had been established, and consequently that not merely the particular share of the property that may have belonged to Toofani Singh, but the whole undivided estate was liable for the debt.

The respondent then brought his case before the High Court by special appeal, which, by its decree of the 14th June 1873, reversed the decree of the Lower Appellate Court, and ordered that the plaintiff should obtain possession from the defendants of the property which was the subject of suit for the benefit of the joint family. The present appeal, which has been heard *ex parte*, is against that decree.

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A good deal of the argument at their Lordships' bar was addressed to the question of the nature of the judgment-debt, and whether or not there was "legal necessity" for the loans of which it was composed. Whatever may be their Lordships' opinion of the finding of the Zillah Judge upon this point, they must, for the purposes of this appeal, treat it as conclusive. The appeal is only from the order on special appeal; and on that special appeal the High Court could not have disturbed the finding of the Lower Appellate Court on this question of fact, unless there was no evidence at all to support it. And this, whatever was the character and weight of the evidence, cannot be affirmed.

This issue, however, seems to their Lordships to be immaterial in the present suit, because whatever may have been the nature of the debt, the appellant cannot be taken to have acquired by the execution sale more than the right, title, and interest of the judgment-debtor. If he had sought to go further, and to enforce his debt against the whole property, and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it. By the proceedings which he took he could not get more than what was seized and sold in execution, viz., the right, title, and interest of the father. If any authority be required for this proposition, it is sufficient to refer to the cases of *Nugenderchunder Ghose vs. Srimutty Ramunee Dossee*, 11 Moore Ind. App., 241; and *Baijun Doobey vs. Brij Bhookun Lall Awasti*, L. R., 2 Ind. App., 275.

The first and principal question, however, that arises on this appeal is, whether the appellant acquired a good title even to the right, title, and interest of the father; whether under the law of the Mitacshara the share of one co-sharer in a joint family estate can be taken and sold in execution of a decree against him alone. In Lower Bengal, where this question can arise only between brothers or other collaterals (sons not having as against their father in his lifetime, under the law of the Daya Bhaga, the rights which they have under the law of the Mitacshara), it is settled law that the right, title, and interest of one co-sharer in a joint estate may be attached and sold in execution to satisfy his personal debt; and that the purchase under such an execution

stands in the shoes of the judgment-debtor, and acquires the right as against the other co-sharers to compel a partition.

That a similar rule prevails in the south of India, though the law there administered is founded on the Mitacshara, is shown by two cases decided by the High Court of Madras, *Vrásvámi Grámini*, 1 Mad., 471; and *Palani Valappa Ramdau vs. Manara Naickan*, 2 Mad., 416. The latter case was one in which, as here, the co-parceners were father and son; and that the law is to the same effect in the Presidency of Bombay, was ruled in the two cases which are reported at 1 Bom. 39,¹ 182.*

All these cases, however, affirm not merely the right of a judgment-creditor to seize and sell the interest of his debtor in a joint estate, but also the general right of one member of a joint family to dispose of his share in a joint estate by voluntary conveyance without the concurrence of his co-parceners. This latter proposition is certainly opposed to several decisions of the Courts of Bengal.

In 1869 the question was carefully considered by the High Court of Calcutta. A Division Bench of that Court referred it to a Full Bench in the case of *Sadabart Persad Singh vs. Phoolbash Koer*.

The decision of the Full Bench is reported in 12 W. R., 1, *Full Bench*, and 3 B. L. R., 31, *Full Bench*. The Chief Justice, after reviewing all the authorities, came, with the concurrence of his colleagues, to the conclusion that under the law of the Mitacshara, as administered in the Presidency of Fort William, "*Bhagwan Lall*," whose act was in question, "had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family." The Full Bench so reported to the Division Bench, and the latter then made its final decree in the cause, which involved many other questions. From that decree there was an appeal to Her Majesty in Council, which was heard *ex parte*. This Committee, for the reasons stated in their judgment, which is reported in L. R., 3, Ind. App., p. 7 (see also 25 W. R., 285; 1 L. R., 1, Cal., 226)

¹ *Goondo Mahadeo vs. Rambhut bin Baboobhut*.

* *Damodhur Vithul Khare vs. Damodhur Hari Somana*.

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did not think it necessary or expedient either to affirm or disaffirm the ruling of the Full Bench on this point. Their Lordships said they "abstained from pronouncing any opinion upon the grave question of Hindoo law involved in the answer of the Full Bench to the second point referred to them, a question which, the appeal coming on *ex parte*, could not be fully or properly argued. That question must continue to stand, as it now stands, upon the authorities unaffected by the judgment on this appeal."

It is, however, to be observed that even the Full Bench in the case under consideration recognized a possible distinction between the sale of a share in a joint estate under an execution, and an alienation by the voluntary act of a co-sharer, and thought that the former might be valid, though the latter was invalid. In dealing with the first question referred to the Full Bench, the Chief Justice says :—

"It is unnecessary for us to decide whether, under a decree against Bhagwan in his lifetime, his share of the property might have been seized, for that case has not arisen. According to a decision in Stokes' Reports (1 Mad., 471), it might have been seized, but the case as against Bhagwan, and that against the survivors, are very different. So long as Bhagwan lived, he had an interest in this property, which entitled him, if he had pleased, to demand a partition, and to have his share of the joint estate converted into a separate estate."

The decision in Sadabart's case has been followed by, amongst others, that of Mahabeer Persad *vs.* Ramyad Singh (20 W. R., 192 ; 12 B. L. R., 90,) being the case referred to in the judgment under appeal as No. 209 of 1872.

That was a decision by the two learned Judges who passed the decree now under appeal, and the circumstances of the one case are nearly the same as those of the other. In that of 1872, the father had borrowed the money ostensibly on his sole credit, and given a Bengali mortgage bond to secure it. The bond-holder had sued on his bond, obtained a decree, taken out execution against joint property, and become the purchaser of it at the execution sale. The distinction between that case and the present is, that the property seized and sold was that which was specially hypothecated by the bond. The sons sued to recover the property. There was

a clear finding against the alleged "necessity" for the loan. The Court laid down in the strongest terms the law as established by the Full Bench ruling in Sadabart's case and other decisions, and appears to have assumed that a title acquired by means of an execution sale stood on no higher ground than one founded on a voluntary alienation.

It asserted, however, the power of imposing equitable terms upon the son, whom they held entitled to recover; and these terms were, in effect, that the property, when recovered, should be held and enjoyed by the family in defined shares; and that the share of the father, the judgment-debtor, should be subject to the lien of the judgment-creditor for the money advanced, with interest. In the present case the same Judges have refused to recognize any such equity, proceeding on the ground that the execution was taken out, not against the property especially hypothecated, but against the general estate.

It is difficult to see upon what principle the hypothecation of the property in question can be taken to improve the position of the creditor, since the very act of hypothecation implies a violation of the rule laid down in Sadabart's case. It is further to be observed that in one respect the equity of the creditor is stronger in the present case than it was in that of 1872, since here it has been found by the Lower Appellate Court that "legal necessity to borrow the money existed;" whereas, in the case of 1872, there was a clear finding the other way. Their Lordships, therefore, are of opinion that the reasons which the learned Judges have given do not justify their refusal to give to the defendant in this case the benefit of the equity which they enforced in the other.

But what is the effect of the decision of 1872? It is a clear authority¹ for the proposition that, although by the law, as settled in that part of the Presidency of Fort William, which is governed by the Mitacshara, a member of a joint family cannot encumber his share in joint property without the consent, express or implied, of his co-partners, the purchaser of it at an execution-sale

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¹ See also *Kalles Poddo Banerjee vs. Choiton Pandah* (COUCH, C.J., and AINSLIE, J.), 22 W. R., 214.

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nevertheless acquires a lien upon it to the extent of his debtor's share and interest.

There appears to be little substantial distinction between the law thus enunciated, and that which has been established at Madras and Bombay; except that the application of the former may depend upon the view, the Judges may take of the equities of the particular case; whereas the latter establishes a broad and general rule defining the right of the creditor.

Their Lordships, finding that the question of the rights of an execution-creditor, and of a purchaser at an execution-sale, was expressly left open by the decision in *Sadabart's*¹ case, and has not since been concluded by any subsequent decision which is satisfactory to their minds, have come to the conclusion that the law, in respect at least of those rights, should be declared to be the same in Bengal as that which exists in Madras. They do not think it necessary or right in this case to express any dissent from the ruling of the High Court in *Sadabart's*¹ case as to voluntary alienations. But however nice the distinction between the rights of a purchaser under a voluntary conveyance, and those of a purchaser under an execution-sale may be, it is clear that a distinction may, and in some cases does, exist between them. It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution-sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value.

It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindoo estate; and that it may be so applied without unduly interfering with the peculiar *status* and rights of the co-parceners in such an estate, if the right of the purchaser at the execution-sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place.

¹ 12 W. R., 1, F. B.; 3 B. L. R., 31, F. B.

In the present case their Lordships are of opinion that they ought not to interfere with the decree under appeal so far as it directs the possession of the property, all of which appears to have been finally and properly found to be joint family property, to be restored to the respondent; but they think that the decree should be varied by adding a declaration that the appellant, as purchaser at the execution-sale, has acquired the share and interest of Toofani Singh in that property, and is entitled to take such proceedings as he shall be advised to have that share and interest ascertained by partition; and they will humbly advise Her Majesty accordingly. They desire to add that they cannot make any more precise declaration as to Toofani Singh's share, since, if a partition takes place, his wife may be entitled to a share; and, further, that there will be no order as to the costs of this appeal.

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[CRIMINAL REVISIONAL JURISDICTION.]

1877
April 21.
—

IN THE MATTER OF KRISHNA MOHUN BYSACK, PETITIONER.

Sections 518, 520, Code of Criminal Procedure—Court of Revision—Judicial Proceedings.

The existence of the circumstances mentioned in Explanation I is a condition precedent to the action of a Magistrate, under Section 518, Code of Criminal Procedure.

If the matter is one which cannot properly be dealt with under Section 518, it does not fall within that Section, and being a judicial proceeding is not protected by Section 520 from the action of a Court of Revision under Section 297.

THIS was an application to set aside the order of the Magistrate of Dacca, under Section 518 of the Code of Criminal Procedure.

For Petitioner : *Baboo Hurry Mohun Chuckerbutty.*

The facts of this case are sufficiently set forth in the judgment of the High Court,¹ which was delivered by

MARKET, J. MARKBY, J. :—

In this case it appears that there has been litigation between certain persons of the name of Bysack, and the present applicant, Krishna Mohun Bysack, alleges that he obtained a decree in the Civil Court; to these proceedings it is said that the Magistrate of the District, as Chairman of the Municipality, was a party; but whether, strictly speaking, he was so or not, is not material in the present enquiry. Subsequently, on the application of Nund Coomar Bysack and Hurry Mohun Bysack, who appear to have been unsuccessful parties in the litigation, an order was made under Section 518 by the Magistrate of the District that Krishna Mohun Bysack, the present applicant, should not proceed with the building of a wall which he had commenced to erect upon the land in dispute, pending further orders. This order appears to have been made without taking any evidence, and without hearing Krishna

¹ MARKBY and ROMESH CHUNDER MITTAL, J.J.

Mohun Bysack. Krishna Mohun Bysack thereupon put in an application, the object of which was to get rid of that order. The Magistrate refused in any way to modify his previous order, and he also refused to change his order to a proceeding under Section 521.

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No one appears on the part of the Crown to support the order of the District Magistrate, nor has the District Magistrate sent us any explanation whatever of his proceedings in the matter. It appears that notice of this application, as directed by us, has been served upon the District Magistrate. We cannot, therefore, under these circumstances, do otherwise than assume that the allegations made by the petitioner are correct, though we should be reluctant to think that an officer in the position of Magistrate of a District should have acted in what appears to be so arbitrary and injudicious a manner. At any rate we have no doubt that the order of the Magistrate was illegal. There is not anywhere in these proceedings the slightest indication that this is a case where any delay which would be occasioned by a resort to less summary proceedings would occasion any serious evil whatever; and we consider that the Magistrate has taken an erroneous view of the law when he says that he must adhere to his order since he had no power to issue an order under Section 521. The Magistrate seems entirely to have forgotten that he has no power at all to take proceedings under Section 518 to prevent a nuisance, except in certain special cases which the Act has defined, namely, where immediate action is rendered necessary, and delay is impossible by reason of the existence of the circumstances mentioned in the Explanation appended to Section 518. We consider that the existence of the circumstances there stated, showing the necessity of immediate action, is a condition precedent to the Magistrate having power to act under Section 518 at all. But there is nothing whatever to shew that such circumstances existed in the present case.

The more difficult question arises whether this is a case in which this Court has power to interfere under Chapter XXII of the Code of Criminal Procedure. That Chapter clearly extends to all judicial proceedings of Magistrates, and by Section 4 a judicial proceeding is declared to mean any proceeding in the course of which evidence is or may be taken. Section 518 does not re-

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quire the Magistrate to take evidence, but he would no doubt be empowered to do so, and considering that orders made under this Section may affect property to an unlimited extent, no one can doubt for a moment that all orders under this Section are, as a matter of fact, "judicial proceedings." When, therefore, Section 520 declares that orders under that Section are not judicial proceedings, it does not make them in reality less so. The object of the Legislature was simply to prevent orders properly made under Section 518 becoming the subject of revision by this Court. But it is necessary to confine the operation of Section 520 to orders which the Magistrate did make, and was empowered to make, under Section 518. It would be most dangerous to allow a Magistrate to disregard altogether the limitation put upon his powers under Section 518 by Explanation I, and by assuming to himself to make under that Section an order which he has no power to make, to emancipate himself entirely from the control of this Court. We have seen more than one indication of readiness on the part of Magistrates to apply Section 518 to purposes for which it was not intended, and we think that this Court, before it allows it to be said that an order made by a Magistrate affecting a man's property is not a judicial proceeding, is bound to see that it belongs to the very exceptional class of cases for which the Legislature has declared that Section 518 was intended.

There is a case reported in 22 W. R., 78 (*Chunder Coomar Roy*, Petitioner), in which it is observed that it is necessary for this Court, in the exercise of power of superintendence, to see that Magistrates who profess to act under Section 518 take care that those conditions under which alone such an order can be legal are fulfilled. We fully agree with that observation, and we only desire to observe, with reference to that case, that we do not think it necessary to resort to the provisions of Section 15 of the Charter Act, as was done by those learned Judges in order to do justice in this case. Indeed, we greatly doubt whether any assistance can be derived from that Section, for in our opinion the provisions of Chapter XXII of the Procedure Code are for this purpose as extensive as those of Section 15 of the Charter Act. We can, and frequently do, under this Chapter, set aside orders made by Magistrates without jurisdiction.

When this case was argued, there was another case turning upon the construction of Section 520, which had been referred to the Full Bench, and we deferred giving judgment accordingly. The judgment of the Full Bench has now been given, but it does not touch the point before us. It merely decides that where the case is, upon the facts found, brought within Section 518, there this Court cannot interfere.

The ground upon which we base our judgment is this, that it appears that the case is not one which falls under the provisions of Section 518, and therefore it does not fall under the provisions of Section 520, and not falling under the provisions of Section 520, it comes within the definition of judicial proceeding, as given in Section 4, and is therefore subject to the same revision as any other judicial proceeding of the Magistrate. We are aware that this is putting a narrow construction upon Section 520, but we consider that such a construction of that somewhat peculiar section is both necessary and proper.

Under the powers of revision, therefore, vested in this Court by Chapter XXII of the Code of Criminal Procedure, we direct that the order made by the Magistrate of Dacca of 1st May 1876, and any subsequent order directing Krishna Mohun Bysack to abstain from erecting a wall on his own premises, be quashed.

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—
Judgment.
—
MARBY, J.

[CRIMINAL APPELLATE JURISDICTION.]

1877 JAMSHEER SIRDAR AND OTHERS APPELLANTS.
 June 29.
 July 24. *Previous trial of other accused—Right of private defence—How to be pleaded—
 Section 105, Indian Evidence Act.*

A Sessions Judge, holding a second trial, should not comment on the conduct of a previous trial.

It is for those who raise the plea of private defence to prove it. The act charged cannot be denied, and the plea of private defence raised as an alternative. If raised, a full account of the occurrence must be given in evidence.

CRIMINAL Appeals from orders passed by the Sessions Judge of Fureedpore on March 20th, 1877, convicting the appellants under Sections 148, 149, and 304 of the Indian Penal Code.

For the Appellants: *Mr. Arathoon.*

For the Prosecution: *Baboo Jugdanund Mookerjea (Junior Government Pleader.)*

The facts of this case, and the points which it is necessary to report, are sufficiently set forth in the judgment of the Court,¹ which was delivered by

AINSLIE, J. AINSLIE, J. :—

We have given our best consideration to the able argument of the learned counsel for the appellant, and we cannot but admit that he has succeeded in showing that there is much in the story of the prosecution which is not true, but nevertheless we think we ought not to interfere with the conviction of the prisoners.

It is beyond question that there was a dispute between the naib of the 10-as. zemindar and a large section of the villagers of Binodepore, on the subject of an enhancement of rent claimed, and that for the purpose of enhancing the rent, the naib intended to make a survey of the village. Whether this dispute was complicated by a difference as to the length of the standard pole to

¹ AINSLIE and McDONNELL, J.J.

be used in the measurement proposed is a less material point, although the prosecution has put forward this question of the unit of measurement as a leading feature of this case.

It is further beyond question that Nyazooden died a violent death; and, although the native doctor, who held the *post-mortem* examination of his body, has given evidence, which has been objected to as confused and inconsistent, and which certainly is not of such a clear and precise character as a Court may ordinarily expect from a skilled witness, we are satisfied that the fracture of the skull and injury to the brain described was the result of a blow inflicted during life, and we see no ground for any suspicion that the body was subjected to violence after death for the purpose of making the case appear more serious than it really was.

Again, we can find no reason to disbelieve that part of the evidence which shows that Nyazooden interfered to put a stop to the measurements which the naib or his ameen was attempting to carry out, and that he got struck down by Jamsheer, and that the other prisoners were then abetting Jamsheer.

In fact, we were principally pressed to find that the accused were acting in self-defence, and were well within the limits of their right. It was admitted that there is no evidence on the record to establish affirmatively the true state of things at the time Nyazooden came by his death, but it was argued that the prosecution had studiously made up a story, surrounded on all sides by false allegations of fact, these false allegations being introduced for the special purpose of making it appear that the accused could not have been acting in self-defence, but were the aggressors, and that if this framework of falsehood could be destroyed, the Court should infer the true state of the case to be precisely the reverse of what the prosecution had sought but failed to establish.

Some of the persons implicated in this offence were brought to trial before a former Judge of the District in March 1876, and on that occasion the process of destructive criticism was successful, and the accused were acquitted in the Sessions Court. On the present occasion the result has been different, and we think the conviction ought to be affirmed. It is not our business to follow the Judge in his comments on his predecessor's judgment. He could not well avoid some review of it in order to explain his

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Judgment.

AINSLIE, J.

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OTHERS.*Judgment.*

AINSLIE, J.

reasons for coming to different conclusions, but it was not necessary to set it out at full length in his own with a running commentary thereon. The arguments, which prevailed on the former occasion, were all doubtless pressed upon the Judge at this trial, and might have been fully discussed without formally refuting the earlier judgment of the Court. We cannot also avoid noticing that the present judgment embraces various matters that would have been much better omitted. Comment on the mode in which counsel for the accused at the first trial conducted the examination of witnesses before another Judge and other assessors, though introduced to explain discrepancies in the evidence, might very well have been spared. If the gentleman who appeared at the first trial had conducted his case in a manner that was not justifiable, it is to be presumed that the Judge would have checked him. Obviously the Judge, who was not presiding at the trial, was not the proper authority for the expression of opinion as to the conduct of that trial.

But this much remains certain, that there was a fray between the villagers and the zemindar's people, in which the leader of the former came by his death; and we see no reason to doubt that the prisoners were there taking part in it. It is also certain that the cause of the disturbance was a measurement which the zemindar's people wished to carry out. The fact that we really have no reliable evidence of the manner in which the riot began, does not suffice to secure the discharge of the accused. It may possibly be that they were peaceably carrying on the measurement when they were set upon, and that Nyazoodeen was killed by one of them in self-defence, but there is no evidence of this. Even if it be admitted that the evidence shows that, before Nyazoodeen was struck, he commenced the disturbance by attempting to wrest the measuring rod from the hand of the man who was using it, this is not sufficient for the defence. There can be no doubt that the measuring party was there in considerable force, and that there was an intention to enforce the right to measure by force, or show of force. It may be that the right of the zemindar to measure, which is declared by Section 25, Act VIII of 1869 of the Bengal Council, justified an entry on the land, so that the villagers had no right of private defence as against criminal trespass; but this

would not extend to justify this forcing that right of entry by force, or show of force. Section 37 of the Rent Law provides the remedy where the exercise of the right is opposed.

Even if it were assumed that the right to measure was not being wrongfully enforced, it would be necessary for the prisoners to account satisfactorily for the death of Nyazoodeen. His interference with the measurement and seizing the rod in the poleman's hands, which is admitted by the prosecution, and beyond which the prisoners have failed to prove anything, was no assault to justify the inflicting of death.

It is obvious that, under the provisions of the Evidence Act, Section 105, an answer, setting up the right of private defence, must be supported by evidence, giving a full and true account of the transaction from which the charge against an accused person arises. No accused person can at the same time deny committing an act and justify it. The law does not admit of justification by putting forward hypothetical cases ; it must be by proof of the actual facts.

The appeal is dismissed.

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—
Judgment.
—

AINSLIE, J.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

1877
August 9.

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v.
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KINMOND
v.
LAWRIE AND
ANOTHER.

KINMOND vs. JACKSON.

KINMOND vs. LAWRIE AND ANOTHER.

IN THE MATTER OF ACT XV OF 1859, and of a specification filed by one W. JACKSON, and dated 4th December 1872.

IN THE MATTER OF ACT XV OF 1859, and of a certain specification filed by one WM. JACKSON, and dated 9th November 1876.

IN THE MATTER OF ACT XV OF 1859, and of certain specifications filed by one JAMES CRICHTON KINMOND, under the said ACT, and dated respectively the 10th day of November 1875, and the 17th day of March 1877.

IN THE MATTER OF ACT XV OF 1859, and of a certain specification filed by one JAMES CRICHTON KINMOND, dated the 28th day of November 1865.

Suit for injunction—Patent combination—Machine—Improvements—Act XV of 1859, Sections 24 and 25.

The fact that a machine has been several times improved since the original patent was obtained is no argument against its being a useful invention within Section 25, Act XV of 1859.

Cannington vs. Nuttal, Law Rep., 5 H. L., 205, followed as to the test of "novelty" in an invention.

In deciding whether a machine, patented as an entire invention, is an imitation and piracy of another machine previously patented as an entire invention, the question is—Is the later patented machine substantially the same as the earlier one? The fact of considerable differences existing in the several parts of the two machines will not prevent the later machine from being as a whole a copy of the earlier one; even where an exclusive privilege might have been acquired had the alterations in the later machine been claimed as improvements on the earlier one.

Clark vs. Adie, 2 App. Cas., 315, followed.

Where a patent has been obtained for a machine which the patentee subsequently somewhat improves, a subsequent specification claiming the improved machine as a novel combination is bad, though the improvement might be claimed and protected as such.

Where a new arrangement of the parts of a machine is claimed as an improvement, the arrangement must be clearly described in the specification.

The mere substitution of one mechanical equivalent for another already in use will not be protected.

Where a case of infringement of a patent has been made out, an injunction will follow as a matter of course.

A plaintiff cannot pray for an account of profits and for damages. He must elect between the two remedies. If the plaintiff elects to take an account of the profits, such accounts will only be carried back to the period of one year before the filing of the plaint, in accordance with Act IX of 1871, Sch. II, Cl. 11 (See Limitation Act, 1877, Sch. II, Cl. 40).

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THIS was a suit for an injunction to restrain the defendant Jackson from infringing an invention of the plaintiff's for the rolling of tea leaf, and the defendant Lawrie from selling such infringement; the plaintiff also prayed for an account and damages against both defendants. On the 15th of February 1877, Kinmond obtained two rules, calling on Jackson to show cause why a perpetual injunction should not be issued against him. Cross rules were obtained by Jackson on the 31st of May 1877.

For Plaintiff: *Bell, Branson, Evans, and Stokoe.*

For Defendant: *Paul (A. G.), Jackson, Agnew, and Orr.*

The facts of the case, which turned chiefly on the construction of the specifications, are sufficiently given in the judgments of the Court (GARTH, C.J., and MACPHERSON, J.)

The following judgment of the Court on the rules obtained was delivered by

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GARTH, C. J. :—

GARTH, C.J.

These are four rules which have been issued under Sections 24 and 25 of Act XV of 1859, "An Act for granting exclusive privileges to Inventors."

Mr. Kinmond, claiming to be the inventor of a tea-rolling machine, filed his specification under this Act on the 28th of December 1865. After this machine had been in use for some years, Mr. William Jackson, on the 25th of April 1873, filed a specification, claiming to be the inventor of another tea-rolling machine. On the 30th of December 1875 Kinmond filed another specification as inventor of another tea-rolling machine. On the 9th of No-

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vember 1876 a second specification was filed by Jackson, as the inventor of another tea-rolling machine, and on the 17th of March 1877 Kinmond filed a third specification.

On the 15th of February last Kinmond obtained a rule under the above Sections, calling upon Jackson to shew cause why it should not be declared, that no exclusive privilege had been acquired by him under his first specification, by reason of certain objections, mentioned in the rule; and on the same day he obtained a similar rule to invalidate Jackson's rights under his second specification.

On the 31st of May Jackson obtained a rule of the same kind against Kinmond to invalidate his rights under his first specification; and another similar rule on the same day, as regards his second and third specifications.

These rules have now been heard at considerable length, each being dealt with separately, though the affidavits used in support of or against each have been by consent used generally as evidence in all the rules; and we are glad to take this opportunity of saying that we are much indebted to the learned counsel on both sides for the very able assistance which they have rendered to the Court, in this difficult and somewhat novel proceeding.

The first important point, which we have had to consider, is the validity of Kinmond's first specification.

It is contended that it was bad because his invention was neither useful nor new; and it has been pressed upon us that the question of utility must depend upon whether it was useful or not at the time of the rule being granted, and not when the patent was obtained. The use of the word "is" in the 24th and 25th Sections, when dealing with the question of utility, as contrasted with the word "was," when dealing with the question of novelty, is relied on as supporting this argument, but if an invention is useful, of "utility," within the meaning of the Act, when the specification is filed, we fail to see how it can be said to have ceased to be of utility subsequently, merely because improvements have been made in it. And we find as a fact that Kinmond's first machine is of as much utility now as it was when he filed his specification.

Upon the question whether Kinmond's invention was useful at the time he filed his petition and specification in 1865, we have

no hesitation in saying that it was so. It was practically found to be of great utility, and was used for years in many tea gardens, including one in which Mr. Jackson himself was employed. As we have already said, the fact that improvements have since been made in the original machine, and that the improved machine works better than the original one, in no degree shews that the latter is not now, or that it was not at the time when the specification was filed, useful.

We also think that this invention was novel.

Various earlier attempts had been made to produce a machine which would obviate the expense and delay of rolling tea leaves by hand labor, but Kinmond's was the first which was of any practical utility. And although some of the ideas, which are disclosed in his first specification, are to be found more or less developed in one or other of the earlier attempts, Kinmond's machine as a whole, as a combination, certainly was novel. The language of the Lord Chancellor Hatherley, in the case of *Cannington vs. Nuttall*, Law Rep., 5 H. L., 205, applies exactly to the instance before us:—"The skill and ingenuity of the inventor are shewn in the application of well-known principles." Few things come to be known now in the shape of new principles; but the object of an invention generally is the applying of well-known principles to the achievement of a practical result not yet achieved. And I take it that the test of novelty is this: Is the product which is the result of the apparatus for which an inventor claims letters-patent, effectively obtained by any of the separate portions of the apparatus which you have now combined into one valuable whole, for the purpose of effecting the object you have in view?' Applying these words to Kinmond's first machine, we think that, upon the evidence before us, it is plain that the desirable end of rolling tea by machinery had not been effectively obtained until Kinmond hit upon the mode of achieving the object by his invention.

Gibbon's machine and Shipp's machine have in particular been relied on, as depriving Kinmond's invention of the merit of novelty.

But these machines were neither of them of any practical utility; and, moreover, neither bears any real resemblance to Kinmond's,

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though doubtless one or two ideas may be found in them, which Kinmond may have adopted. But, as was observed by Lord Justice James in the case of *Murray vs. Clayton*, Law Rep., 5 Ch., App. 570, "I am not aware of any principle or authority upon which the exhibition of a useless machine, which turns out a failure, can be held to effect the right of a patentee who has made a successful machine, although there may be a degree of similarity between some of the details of the two machines."

On the whole, we have no hesitation in holding that Kinmond's first machine, as a combination, was invented by him, and was both useful and novel within the meaning of the Act; that an exclusive privilege in respect of that invention has been acquired under Act XV of 1859; and that the rule, calling upon Kinmond to shew cause why it should not be declared that he acquired no such exclusive privilege, should be discharged. We think, however, that his specification entitles him to an exclusive privilege, only for the machine as a whole, and not for any of the component parts separately.

We proceed next to consider Jackson's first specification, filed on the 25th April 1873.

It is contended that it gave him no exclusive privilege, because his machine was not new, being in substance and effect an imitation and piracy of Kinmond's.

In dealing with this question, it is necessary to consider, not only the terms of the two specifications, but what is the substantial principle and nature of the machines themselves, when constructed and in working order.

It may be possible to describe a machine in such language as to conceal the fact in some measure that it is really an imitation and infringement of a former patent; and it may also be possible to change the shape and outward general appearance of the machine itself when constructed, in such a way as to make it look different, from some other known machine. But what we have to see is whether, apart from the mere words used in the specification, or any apparent dissimilarity in the form of the machine, Jackson's invention is in substance the same as Kinmond's.

As we have already said, Kinmond's is a specification claiming the machine as whole, and not any of its parts by themselves; and

we think that the essence or substance of the invention underlying the combination, is the rolling of tea leaves between two wooden plates of uneven surface placed horizontally in a sort of loose box, capable of being compressed or expanded vertically at pleasure, so as to regulate the pressure brought to bear upon the leaves. Such an invention, like any other invention, may be pirated by being taken in a disguised or altered form; and the question is whether Jackson's machine, as described in his first specification, is practically the same as Kinmond's, or is in effect a new or different combination, and whether Jackson has not really taken and adopted the principle and substance of Kinmond's machine (see *Clark vs. Adie*, Law Rep., 10 Ch., 667, and 2 App. Cas., 315).

Having given Jackson's first specification our best consideration, we are of opinion that it also is a specification describing a complete machine, the expressed object of which is to secure protection for the whole as a combination, and not merely for certain new parts by themselves. It commences thus:—"Description of tea-rolling machine. The machine consists of," &c., and throughout it deals with the invention as being of the machine.

It is true that in the specification it is said:—"Part of my invention is the shape of these tables;" and also that towards the conclusion, attention is drawn to certain particular points, thus, by the bevel gearing being put at, &c., the upper plate will be found to describe a plane rectilineal angle. This is the main point of my invention, and also that as many teeth as there are in the bevel gearing, so many different motions can be imparted to upper plate. The main points of the invention are the upper plates and lower tables; also the motion gained out of the machine, particularly that of the plane rectilineal angle. The above machine forms the nearest motion to that of hand-rolling yet invented: also rolls the greatest quantity of leaf," &c. But notwithstanding that attention is called to these main points, the fact remains that the specification evidently claims the invention as a whole, and does not claim any of the parts, either separately or in combination. And this is rendered more clear by a reference to Jackson's petition for leave to file his specification, where he distinctly asks leave to file a specification of his invention, as for an entire machine.

The machine thus described in his specification is, in our opinion,

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neither more nor less than Kinmond's altered and, it may be, improved: *firstly*, in the arrangement of the lower table, which in Jackson's machine is supported by a hinge on one side, and weights running over pulleys on the other, whereas in Kinmond's it is supported by weights and pulleys on both sides; *secondly*, in the recesses or cavities in the lower table and upper plate in lieu of the cavity formed merely by the corrugated plates in Kinmond's table; and, *thirdly*, in the substitution of the "rectilinear angle" and other motions in lieu of the simple rotatory motion of Kinmond. In this machine, differing from Kinmond's only in these points, the question is, whether Jackson has not taken substantially the whole or (to use Lord Cairns' expression in the case of *Clark vs. Adie*) "the pith and marrow" of Kinmond's invention. It seems to us that he has; that he has taken the whole substantially, though perhaps somewhat improving certain parts.

It has been strongly urged that the variety of motions which Jackson's machine produced, more especially the plane rectilinear motion, was in itself such an improvement upon Kinmond's as to justify Jackson in treating his machine as an entirely new combination; and it is no doubt said in some of the affidavits, that this movement is better than the rotatory motion, and rolls the tea leaf more effectually. But the force of this evidence, and of the agreements based upon it, is materially weakened by the opinion deliberately expressed by the Messrs. Jackson themselves, that the "plane rectilinear angle" is not the most useful movement, and by the fact that in their second specification they say that the most useful motion is one much more closely resembling Kinmond's rotatory motion, *viz.*, a figure of 8, or an "elliptical ovular figure," which they say, is the most suitable action "for the curling, rolling or twisting" of the tea leaf. The shape of this ovular figure, as produced by the model machine, which was exhibited in Court, is more nearly in form an ostrich's egg than anything else; and the variety in the motion which can be given to the machine seems to consist mainly in the width given to this egg figure.

As to the mere providing different treatment for different kinds of tea leaf, there is no novelty in that, for Kinmond, in his first

specification, states that "the amount of pressure is changed to suit good and bad tea leaf, &c."

It may be that, if Jackson's specification had been for one or other of his alterations as improvements *per se* of parts of Kinmond's machine, he might have acquired an exclusive privilege in respect of them as improvements; but then he should have claimed them in that way, and his specification should have been limited to the improvements. As it is, it claims the whole combination, and is therefore bad. It was admittedly (see his affidavit filed on the 4th of May 1877, paras. 7—10) the result of an effort made by him to improve Kinmond's; and his first machine was actually made in one of Kinmond's frames.

On this rule, therefore, we decide in favor of Kinmond.

The next specification in order of date is Kinmond's second, filed in the end of 1875. This also describes the whole machine as a combination; and in our opinion it is bad. For though Kinmond might have filed a specification describing improvements made by himself in parts of his own original invention, and might so have acquired an exclusive privilege in respect of those improvements as such, he could not acquire a fresh term of exclusive privilege for a whole machine as a novel combination, merely by improving somewhat upon his own previous substantive invention. This specification is bad for the same reasons as Jackson's first.

The two important alterations in his original machine, which are described in his second specification, were the central cavities or recesses, and the motion given to the under table as well as to the upper. As to the cavities, they had been long in use in Jackson's machine. There was no novelty in them, and by introducing them into his specification, Kinmond could in no event have acquired any exclusive privilege. He accordingly filed a disclaimer as to these, just as the rule was being issued against him. The giving motion to the under as well as the upper plate was no doubt an improvement; and had this specification been limited to that, it might have been good. But the specification being for the whole combination, and not for the improvement only, it gives no exclusive privilege.

We now proceed to the rule which calls in question Jackson's second specification, filed in November 1876.

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This specification, although it concludes with a statement of five particular matters claimed as new and original, claims also the whole machine as a combination.

It recites a petition for leave to file "a specification of my invention for an improved quadrilateral, angular, ovular, cross-action, self and hand-feeding and discharging tea-rolling machine, given by the two rolling plates moving directly across each other, each guided in a parallel line, and moving at comparative different rates of speed to each other;" and then proceeds to describe the details of the "said invention," i.e., the whole machine or combination, and then it concludes with these words:—"What I claim as new and original are: 1st.—The combination of the above described parts substantially in the manner and for the purposes stated in the foregoing specification, and which combination and arrangement are delineated in the annexed diagram, and in particular the novelty of, &c." Assuming, however, that we could construe this specification as claiming each of the five items detailed at the conclusion as in itself a new invention (apart from the claim of the entire machine), it seems to us that there is nothing in any of them which would entitle Mr. Jackson to any exclusive privilege.

There was no novelty in the rectilineal movement, nor in the variety of other movements; for those were to be found in Jackson's first machine; and there was none in giving a motion of its own to the under table, as well as to the upper table; for that was a part of Kinmond's second machine.

As to the fifth of these matters claimed as new and original, for "the arrangement above described, whereby the machine discharges itself, at regular intervals," &c., we find no sufficient description in the specification of this suggested arrangement. There is nothing to shew how this part of the machine is to be made, nor was it in fact shewn in the model which was produced for our inspection.

As to the second claim we should have some difficulty in holding that Jackson could in any event acquire an exclusive privilege merely by moving his two plates at different rates of speed, which is really the only novelty which he claims under this head; and, moreover, we cannot find as a fact upon the evidence, that the mere difference in the relative speed with which the plates move effects any improvement in the rolling of the tea. The third and

fourth claims (which have been treated by Mr. Jackson's counsel as one) relate to springs being introduced in lieu of pulleys and weights, &c., and improvements in the mode of regulating the pressure. We think that this is merely the substitution of one mechanical equivalent for another already in use, and is, therefore, not entitled to protection.

There only remains to be considered Kinmond's last specification, filed on the 6th of April 1877. As to this it is unnecessary to go into details, for having regard to the previous specifications which had been filed, it is impossible to say that there is any novelty in it. There is nothing substantially different from what is to be found in one or other of the earlier specifications. The truth of the whole matter appears to be that Kinmond, having invented the first practically useful machine, Jackson, having used it for some time and found it answer, made improvements in it. Instead of acknowledging that these were only improvements, he chose to ignore Kinmond's machine altogether, and to file a specification as inventor of an entirely new machine.

This was in every sense wrong. There is no doubt that the credit of having invented the first practically useful machine was Kinmond's; and Jackson's proper course was, giving Kinmond the benefit to which he was fairly entitled, to have filed a specification of the improvements made by him as such. Jackson having claimed protection for his machine as a whole, there has since been a sort of race between the parties, each professing to know nothing about the work of the other, but each taking advantage of ideas suggested by the other, while adding something of his own. That such a course should lead to expensive litigation is not surprising.

The result is, that we find that Kinmond by his first specification acquired an exclusive privilege for his machine, as a combination; but that no exclusive privilege was acquired under any of the later specifications. Kinmond is entitled to the costs of his two rules against Jackson, and also to the costs of Jackson's rule as to his first specification; but Kinmond must pay Jackson's costs of the rule as to Kinmond's two later specifications. These costs will be set off against each other *pro tanto*, and will be on scale No. 2.

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The injunction having come on for hearing, the following judgment was delivered by the Court :—

GARTH, *C.J.* (MACPHERSON, *J.*, concurring)—

This was a suit for an injunction to restrain the defendants from infringing an invention of the plaintiff for the rolling of tea leaf, the specification of which was filed, under the provisions of Act XV of 1859, on the 6th November 1865; and the plaintiff also prayed for an account of the profits made by the defendants, and for damages.

The question of infringement has virtually been decided by our judgment in the several rules obtained by the plaintiff on the one hand, and the defendant W. Jackson on the other, which was given on the 9th of August last.

On the first of those rules we decided that Jackson's invention, the specification of which was filed on the 25th of April 1873, was substantially an imitation of Kinmond's; and it is admitted that between that date and the commencement of this suit, the defendants have been making, using and selling a number of machines in accordance with that specification. The parties have very properly consented that all the affidavits and materials which were used before the Court on the argument of the rules, should be taken as evidence in this suit. The infringement, therefore, being established, it is clear that the plaintiff is entitled to the injunction which he prays.

As regards the rest of his claim, the defendants objected at the trial, that the plaintiff was not entitled both to damages and to an account, and that he must elect between the two remedies. This is quite true; and the plaintiff has accordingly elected to have an account of the profits, but then comes the only real question in the case, for how many years before suit the account is to be taken.

The defendant contends that Article 11, in the second Schedule to the Limitation Act, is the one applicable to this suit. That Article enacts that, in a suit for damages for infringing a copy-right, or any other exclusive privilege, the period of limitation

shall be one year from the date of the infringement. On the other hand, the plaintiff contends that, as he has waived his claim for damages, and asks to have an account instead, the suit is one which would have been brought in a Court of Equity in England, for an injunction and an account; and, therefore, that Cl. 118 of Schedule II applies to this case, as being a suit for which no period of limitation is provided elsewhere in the Schedule.

I was of opinion at first, that the plaintiff's contention was right; but upon consideration, and more particularly having regard to the repealed Section of the Indian Copyright Act XX of 1847, and to the Patent Act of 1859, I have come to a different conclusion.

By the 16th Section of the Indian Copyright, it was enacted that "all actions, suits, bills, indictments, information and other criminal proceedings for any offence committed against the Act, shall be brought, sued and commenced within twelve calendar months next after such offence committed," &c. The Indian Limitation Act IX of 1871, Section 2, repeals Section 16 of Act XX of 1847, to the extent of the words "actions, suits and bills." It thus repeals the limitation prescribed by that Section in the case of civil proceedings, "actions, suits, and bills," for infringement of copyright; and then by Article 11, Schedule II, enacts that in suits "for damages for infringing copyright or any other exclusive privilege," the period of limitation is to be one year, beginning to run on the date of the infringement.

There can be little doubt that the intention of the framers of Article 11 was to supply the place of the repealed provisions in Section 16 of Act XX of 1847 relating to civil suits; and I think we ought to read the words of Article 11 as not confined to what is technically known at common law as an action for damages, but as meaning generally every civil suit seeking a remedy for infringement, &c., &c.

We have then also to look at Section 22 of the Patent Act XV of 1859, which enacts that an action may be maintained by an inventor against any person who, during the continuance of any exclusive privilege granted by this Act, shall without license make use of, or sell, the said invention, &c.: Provided that no such action

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shall be maintained in any Court other than the principal Court of Original Jurisdiction in civil cases, &c.

This is the Section under which an inventor has his remedy by civil suit for any infringement of his exclusive privilege. The term used, "an action," is quite general, and includes every form of suit, whether an action for damages (in the technical sense), or a suit for an account of profits.

In my opinion Article 11 of Schedule II embraces any suit or action brought under Section 22 of Act XV, and there was no intention of drawing any distinction between a suit framed as an action for damages, and one framed as a suit for an account. The taking of an account of profits is only a mode of compensating an inventor for the infringement of his privilege, other than by an assessment of damages; and it seems unreasonable that, if the period of limitation is one year in the one case, it should be six years in the other. We think, therefore, that the plaintiff is entitled to an account of the profits for one year only from the date of the filing of the plaint; and he will have his costs of suit on scale No. 2.

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The principal question in this suit was that of costs. The following judgment were delivered by the Court :—

Judgment. GARTH, C.J. :—

GARTH, C.J. In this suit we have really no question to decide.

It is admitted that, assuming our judgment in the first rule to be correct, Messrs. Balmer, Lawrie & Co., who were the agents of the defendants for the sale of their machines, have infringed the plaintiff's patent.

He is, therefore, entitled to an injunction against them, as well as against Messrs. Jackson; and, as the defendants have very sensibly consented that Rs. 300 should be the amount of damages assessed, an account in this case becomes unnecessary.

The only point really argued by the defendants was to the costs. They contended, in the first place, that there was no necessity for bringing a suit against them as well as against the Jacksons, because if an injunction was obtained against them and their agents,

that would operate to restrain the defendants from infringing the plaintiff's patent. They also say that they were willing to give the plaintiff any information that he required with regard to the machines sold.

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We think, however, that as the Messrs. Jackson were not in the country when the suit was commenced, and as the information offered was not all that the plaintiff had a right to demand, the defendants must pay the costs on scale No. 2.

Judgment.
GARTH, C.J.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

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August 15. JOHN BOYLE BARRY PLAINTIFF,
AND
JOHN BOYLE OCTAVIUS STEEL DEFENDANT.
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Trustee—Breach of Trust—Removal of Trustee—Declaration of Trust.

The Court will not, at the instance of one of two defaulting trustees, declare the liabilities arising from a breach of trust without having all the parties concerned before it. Nor will the Court pass an order which might in any way tend to be construed as an assent to a breach of trust already committed, even though the breach may have been beneficial to the trust estate.

For Plaintiff: *Bell and Bonnerjee.*

For Defendant: *Montrieu.*

MACPHER-
SON, J. MACPHERSON, J.:—

THIS is a suit against a trustee to declare that the property belonging to the trust consists of certain items specified in the plaint, for an order that the defendant do assign and transfer to the plaintiffs the trust property, and for a declaration that neither the defendant nor the firm of Steel, Mackintosh & Co. has any lien upon certain shares said to form a part of the trust property, &c.

The plaintiff Barry and the defendant are the two original trustees of the marriage settlement of Mr. and Mrs. Roberts; and they both come before the Court, admitting that they have been guilty of a breach of trust. The breach is, that the trust funds have not been invested in accordance with the provisions of the deed of settlement; but the investments have, up to the present time, apparently been very beneficial to the trust estate. Whether beneficial or not, however, there is no doubt that the trustees have committed a breach of trust, and that the trust funds are not properly invested.

The breach of trust, such as it is, has been committed by Mr. Steel, with the knowledge and approbation of Mr. Barry; and also, as appears from the correspondence, with the approbation of two of the *cestuique* trusts namely Mr. and Mrs. Roberts.

Mr. Steel has recently become desirous of being released from

further acting as a trustee, and Mr. Barry was ready to assist him in obtaining his release. A great deal of correspondence took place, which was all perfectly friendly until Mr. Barry placed the matter in the hands of his attorneys. Since then, the correspondence has become very lengthy and acrimonious.

The defendant has all along been anxious to make over the trust property to the plaintiff Barry, and to a new trustee to be appointed in the room of the defendant; and he has offered no objection to the appointment of Mr. Parker (a brother of Mr. Roberts) as the new trustee. The only difficulty which, so far as I can see, he has ever raised is that he has always said upon the face of the letters of Mr. Barry himself is evidently true, that in respect of certain of the shares, which are now subject to this trust, the firm of Steel, Mackintosh & Co. has, or at any rate contends that it has, a lien or claim. The defendant objected; and, as it seems to me quite rightly to enter into a covenant that these shares were under no liability in respect of Steel, Mackintosh & Co.'s claim, and because he refused in assigning these shares to the plaintiffs to give such a covenant, this suit has been brought.

It is true that the defendant proposed to introduce into the deed a statement that a certain sum specified was due to Steel, Mackintosh & Co.; but the real point in which the parties differed was, as to whether Steel was bound to covenant that the property was wholly unincumbered.

It seems to me that the suit is bad, and that it must be dismissed with costs.

Mr. Barry's position is altogether peculiar. Whatever may be Steel's liability by reason of the breaches of trust committed, it is pretty clear that liability is shared by Barry; yet, the plaintiffs come into Court, not seeking to have the investments rectified and the trust estate administered, so that due effect may be given to the original settlement, but simply asking for an order that these investments, which are not warranted by the settlement, may be transferred to them, at the same time praying that the Court will decide the question as to the position of the firm of Steel, Mackintosh and Co. with reference to the advances said to have been made by them for the benefit of the trust.

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BARRY

v.

OCTAVIUS

STEEL.

Judgment.

MACPHER-

SON, J.

The Court cannot do what is sought. Seeing that the investments are not warranted by the trust deed, the Court can do nothing which can be taken to be a confirmation or adoption of those investments. Then the *cestuique* trusts who have approved and sanctioned the breach of trust are necessary parties to any suit in which the liabilities of those who are implicated in the breach are to be determined. Besides this, there are infants who are also interested in this trust, and they ought to be in Court and properly represented; and finally how am I to dispose of the rights of the firm of Steel, Mackintosh and Co. when they are not before me?

The defendant nearly a year ago, in a letter to Barry, stated what he then proposed to do; and it seems to me that what he then proposed was the really proper course for him to take. On the 26th October 1876, he wrote:—"I want to be relieved at once of my trust responsibilities, or I shall have to do what I said, that is, to go before the Court and make a complete confession of the state of the trust, and ask to be allowed to replace, as far as I am concerned, the trust in its original position." If Mr. Steel desired to be released from future liability, that was the only safe course to take. Having committed a breach of trust, no decree I can now make in a suit framed, as this will save the defendant from future liability; and a trustee who has committed a breach, in no degree relieves himself of his liability by retiring and making room for a new trustee appointed, I may say, for the avowed object of continuing the breach of trust.

Of course, if Mr. Steel, having committed a breach of trust, brings the matter into Court to get rid of the responsibilities which he has brought upon himself by reason of his breach, it may be that the costs of the suit will have to be borne wholly or in part by himself. Still it is probably only by such a suit that he can now really get rid finally of this liability.

In conclusion I must say that, so far as appears from this plain and written statement (which are the only materials now before me), I find nothing whatever to the discredit of the defendant beyond the admitted breach of trust as regards the investment of this money; and in that breach, Mr. Barry is just as much concerned as is Mr. Steel.

The suit is dismissed with costs on scale No. 2.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF TROYLOKHYANATH
MITTER AND ANOTHER ... PETITIONERS.

1877
June 12.

Improper discharge—Order for trial—Section 297, Code of Criminal Procedure—Power of High Court.

In considering whether a person has been improperly discharged by a Magistrate, the High Court, under Section 297, Code of Criminal Procedure, is not restricted only to an error in law, but can order a trial where *primâ facie* the evidence establishes a case against the accused to which he should be required to enter on his defence.

The Sessions Judge was, however, not competent himself to order the trial or inquiry to proceed, but as the order was otherwise a proper order, the High Court in setting it aside revived it as its own order.

THE Deputy Magistrate, before whom complaint of a warrant case was made against the petitioners, dismissed the case after hearing the evidence for the prosecution.

For Petitioners : *Baboo Rashbehary Ghose.*

On application made to him, the Sessions Judge of Burdwan held that the Deputy Magistrate was not competent at that stage of the case to dismiss it. He further held that *primâ facie* a case had been made out against the petitioners under Sections 368, 347, 318, 393 of the Indian Penal Code, and he directed inquiry to be made therein.

Baboo Rashbehary Ghose (for Petitioners.)—The complaint made did not disclose the commission of a Sessions case, therefore the Sessions Judge was not competent under Section 296 of the Code of Criminal Procedure to order inquiry to be made into it. Sections 296, 297, read together, show that an order of discharge, based on an examination and disbelief of the witnesses for the prosecution, cannot be set aside by the High Court.

1877

The judgment of the High Court¹ was delivered by

TROYLOKHYA-
NATH
MITER,
PETITIONER.

AINSLIE, J. :—

Judgment.

AINSLIE, J.

The Deputy Magistrate in the present case, having heard the complaint and taken evidence of seven witnesses for the complainant, discharged the accused.

The complainant, thereupon, made an application to the Sessions Judge, who has set out very fully the reasons for which it was proper for the Deputy Magistrate to proceed with the trial. He accordingly directed him to do so.

That order has been brought before this Court by motion under Section 297 of the Criminal Procedure Code. With reference to the decision reported at I. L. R., 1, Cal., 282 (Mohesh Mistree, Petitioner), it appears to us that the Judge went beyond his power in making the order. At the same time it is quite clear that the order was a proper one, and under the 1st Clause of Section 297 this Court has the power to make such order as may seem fit whenever a case is brought to its notice, without reference to the mode in which the knowledge of the case has been acquired. Under the 2nd Clause of the Section the Court is specifically empowered to direct that any person improperly discharged shall be tried.

It has been contended that this only applies to cases where there has been error in law, such as a case in which, the facts having been properly found by the Magistrate, the law has been misapplied and the accused erroneously declared not to have committed an offence. The case in 20 W. R., 40 (Debichurn Biswas, Petitioner), was referred to us as in point. It appears to us, however, that, that case does not in any way support the contention. That was a case in which the Court declined to interfere, and stated that this Court, as a rule, will not interfere to review the evidence where there had been a regular appeal. We are in no way departing from the practice of the Court not to allow a second appeal on the whole case when we say that the evidence in this case as set out by the Sessions Judge shews sufficient grounds for putting the accused person on his defence. Unless the Court exercises the power in cases similar to this, it will be in the power of any Magistrate to defeat

¹ AINSLIE and McDONELL, J.J.

the provisions of the new Code of Procedure, by which a power to appeal against an order of acquittal has been given, by discharging instead of acquitting.

Therefore, although we think that the order was wrong in form, we think that it was right in substance. We adopt that order and direct the Deputy Magistrate to proceed in accordance with it, if necessary, taking the evidence of the remaining witnesses named by the prosecutor.

It must be understood that we do not intend to say that the case is completely and conclusively proved, so that the conviction of the accused person ought to follow of necessity. All that we say is, that from what has been said by the Judge there is a sufficient *prima facie* case to make it necessary to proceed with the trial.

1877

TEOYLOKHYA-
NATH
MITTER,
PETITIONER.

Judgment:

AINSLIE, J.

[CRIMINAL REVISIONAL JURISDICTION.]

1877
July 31.
—

IN THE MATTER OF RAM SOONDAREE DEBEE . PETITIONER.

Section 531, Code of Criminal Procedure—Possession—Attachment—Order of Magistrate.

It is only when, after recording a proceeding under Section 530, Code of Criminal Procedure, and taking evidence, a Magistrate decides that neither party is in possession or is unable to satisfy himself as to which party is in possession, that he can, under Section 531, attach land in dispute. He is not competent summarily to order attachment without such preliminary proceedings.

THIS was an application to the High Court, or a Court of Revision, to set aside the orders of the Magistrate of Bograh passed under Section 531 of the Code of Criminal Procedure.

For Petitioner: *Baboo Bycont Nath Dass.*

The facts are sufficiently set forth in the judgments of the High Court¹

WHITE, J.:—

We are of opinion that the order of the Magistrate in this case must be set aside. It is an order directing that certain land should be attached “until such time as the Civil Court shall issue clear orders as to the possession of the same.” It purports to be made under Section 531 of the Criminal Procedure Code, which allows a Magistrate, when he is unable to satisfy himself as to who is the party in possession of land, to attach it until a competent Civil Court determines the rights of the parties. The Magistrate has made this order without holding any enquiry or taking any evidence, or recording any proceeding as to who is the party that is in possession of the land, and without deciding upon any evidence that was before him that the fact of actual possession was incapable of determination. It appears that, as far back as 1866, the present applicant was, by an order of a Magistrate’s Court, put in posses-

¹ WHITE and ROMESH CHUNDER MITTER, J.J.

sion of this identical land, pending the result of proceedings taken against her by Brojendronath and others, in a Civil Court for the establishment of their title. It also appears that a suit has been brought by Brojendronath and others to establish their title, in which they have succeeded in establishing their title to a portion of the land, while, as regards the remainder of the land, the applicant Ram Soondaree has been declared by the Court to be entitled to retain possession. Brojendronath, however, has not yet obtained execution of his decree. In the meantime quarrels have arisen between the ryots of the respective parties, and one of these quarrels came before the Magistrate of Bograh in the shape of a charge of criminal trespass brought by a ryot of Brojendronath against a ryot of Ram Soondaree in respect of a small bit of land included in the order of 1866. The Magistrate of Bograh, who tried the charge, decided incidentally in the course of hearing it, that this small piece of was in the possession of the ryot of Brojendronath. But on an appeal preferred against the conviction, the Judge came to a contrary conclusion, and reversed the conviction. It would appear that the difference of opinion between the Magistrate and the Judge as to the party in possession of this small bit of land, is the only reason why the Magistrate in the present case has made the order that he has done under Section 531. Now even assuming that no order had been passed giving possession to the applicant in 1866, it was the duty of the Magistrate, before he passed the present order attaching the property, to enter into the question as to who was or was not in possession of the land, to take evidence on the point, and to record a proceeding thereon. It was only when he was unable to determine the fact of actual possession that he was competent under Section 531 to attach the land. On the other hand, taking it that possession of the land was in 1866 awarded to the applicant, it is clear that she is entitled to retain possession of it until ousted by law, and the only facts that could give the Magistrate jurisdiction to entertain an application under Section 530, would be if it were shown that the applicant had lost possession of the land, and the same had come into the possession of other parties, and a new dispute had arisen as to the fact of actual possession. Therefore, in either view of the case,—whether an order was, as we understand it, made in

1877

RAM SOON-
DAREE DEBER,
PETITIONER.

—
Judgment.

—
WHITE, J.

1877 1866 in favor of the applicant, or not—it is clear to us that
 RAM SOON- the order, which the Magistrate has now made under Section 531, is
 DABEE DEBEE, erroneous, and one which he ought not to have made, and it must
 PETITIONER. therefore be set aside.

Judgment.

MITTER, J. MITTER, J. :—

I am also of opinion that the order of the Magistrate in this case, attaching the disputed property under Section 531, should be set aside.

It appears that a Police officer made a report to the Magistrate stating that there was a likelihood of a breach of the peace between the parties to this proceeding. Upon that the Magistrate recorded a proceeding, stating that he was satisfied that there was a likelihood of a breach of the peace, and called upon the parties to put in their respective written statements, and to show cause why the property should not be attached. In pursuance of this order, notice was issued to the parties, and they put in their written statements. The Magistrate, without recording any evidence upon the questions of possession, at once passed an order under Section 531, attaching the property in dispute. I entirely agree with my learned colleague that this the Magistrate was not competent to do. He could pass an order like this, only, if, after recording the evidence upon the question of possession, he was of opinion that he was unable to satisfy himself as to which person was in possession of the subject of dispute, or that his decision on the question of possession was that neither party was in possession. It is clear, therefore, that the proceedings of the Magistrate have not been in accordance with the provisions of the Criminal Procedure Code. We must, therefore, set aside the order complained of.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF MUSSUMAT JAMOTI . PETITIONER,

AND

GADALO KAMAR OPPOSITE PARTY.

1877
August 2.*Section 536, Code of Criminal Procedure—Maintenance of child—Reopening of case decided.*

When a duly empowered Magistrate has decided a matter under Section 536, Code of Criminal Procedure, by dismissing the application after hearing the evidence offered, the District Magistrate is not competent to entertain the complaint *de novo*.

THIS case was submitted to the High Court, as a Court of Revision, by the Sessions Judge of the Assam Valley Districts for the reversal of an order under Section 536, Code of Criminal Procedure, passed by the Deputy Commissioner (Magistrate) of Goalpara, directing Gadalo Kamar to pay one rupee per month for the maintenance of a child born to him by the petitioner Mussumat Jamoti.

The facts of this case appear from the order of the Sessions Judge in submitting it to the High Court :—

Mussumat Jamoti sued one Gadalo for maintenance of herself and child under Section 536 of the Code of Criminal Procedure. This case was originally instituted in the Court of the Extra Assistant Commissioner of Goalpara, an officer with the powers of a Magistrate of the 1st class. The records of this case are also herewith sent.

Gadalo's defence was that Jamoti was not his wife, and that he was not the father of the child.

The Extra Assistant Commissioner, after going fully into the case, dismissed Jamoti's petition on the 15th May last.

On the 8th June Jamoti put in a petition before the Deputy Commissioner, asking him to decide her claim for maintenance. She referred the Deputy Commissioner to the previous proceedings before the Extra Assistant Commissioner, and requested him to send for the records of that case and decide upon her

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 GADALO
 KAMAR.

claim. This petition to the Deputy Commissioner was, in fact, an appeal against the Extra Assistant Commissioner's order dismissing the petitioner's claim.

The Deputy Commissioner thereupon took up the case, heard the petitioner's witnesses, and gave her an order for maintenance of her child, being of opinion that the Extra Assistant Commissioner had overlooked the question as to whether the defendant was the father of the child, and had decided only the question whether she was the wife of defendant.

The following judgment of the High Court¹ was delivered by

JACKSON, J. JACKSON, J. :—

We entirely concur with the Judge.

It is clear that the Extra Assistant Commissioner, who first heard the woman's complaint, went fully into the question of the paternity of the child, indeed, that was the principal question to which he addressed himself.

Even if this had not been so, the complainant's remedy would have been application to a superior Court.

The Deputy Commissioner had no jurisdiction to entertain the complaint *de novo*, and his order is quashed.

¹ JACKSON and McDONELL, J. J.

[CIVIL APPELLATE JURISDICTION.]

GUNNU SINGH PLAINTIFF,
 AND
 LUTAFUT HOSEIN AND OTHERS DEFENDANTS.

1877
 December 10.

Mortgage Bond—No mention of specific property—Vagueness.

A simple covenant not to alienate the obligor's property until payment of a debt and interest does not constitute a mortgage.

SPECIAL APPEAL from a decree of the first Subordinate Judge of Bhagulpore reversing that of the Moonsiff of Begoo Serai.

By a bond entered into by plaintiff and defendant in February 1886, defendant covenanted to pay a certain sum with interest, and there provided that "till the payment of the amount I will not transfer any property by conditional sale or mortgage." The question was, whether this bond amounted to a mortgage of the whole or any part of the defendant's property.

For Appellant: *Baboo Amarendra Nath Chatterjee.*

For Respondent: *Mr. R. E. Twidale and Moonshee Mahomed Yuseof.*

The judgment of the Court¹ was delivered by

GARTH, C.J. :—

GARTH, C.J.

In this case we think that the Subordinate Judge has taken a wrong view of the so-called instrument of mortgage.

We consider that it did not amount to a mortgage at all; but that it was merely a covenant not to alienate any property of the debtor until payment of the money advanced.

The case decided by the Full Bench, which has been relied upon by the respondent, and which is reported in 5 B. L. R. 264 : 13 W. R. 82, F. B., is in our opinion an authority in favor of the view which we now take.

¹ GARTH, C.J., and BIRCH, J.

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OTHERS.*Judgment.*

GARTH, C.J.

The instrument before the Court in that case referred to a specific property by name; and there were expressions in the instrument which led the Court to think that the parties intended that property to be pledged.

But the Chief Justice in that case expressly says that, if the question there had been whether a bond for payment of money, with a simple covenant not to alienate the obligor's property until payment, constituted a mortgage, he thought that question should be answered in the negative.

Now here we have precisely that case. We have simply a covenant, that the debtor, the person borrowing the money, will not part with any of his property until payment of the debt; and we have no such expressions as those which, in the Full Bench case, induced the Court to hold that the instrument amounted to a mortgage.

Those expressions were :—"Should we make all these transactions with respect to the said lands" (that is, the particular lands which were mentioned in the bond), "the instrument relating thereto shall be deemed invalid, and as executed in favor of nominal parties for evading payment of the money covered by the said land." In the absence of any such expressions here, we think that the Full Bench decision does not apply, and that this deed merely amounted to a general covenant not to part with any of the debtor's property.

The result will be that the decision of the Subordinate Judge will be reversed, and the judgment of the Moonsiff restored, with costs in this Court and in the Court below.

[CRIMINAL APPELLATE JURISDICTION.]

DWARKANATH BHUTTACHARJEA AND }
 OTHERS } APPELLANTS. 1877
December 14.

Section 296, Code of Criminal Procedure—Notice to party accused—Order directing commitment.

Before a Court of Session can, under Section 296, Code of Criminal Procedure, direct a Magistrate to commit the accused in a "Sessions case" which has been improperly dismissed under Section 147, it is bound to give the accused person notice of the application for such an order, so that he may show cause why it should not be passed—*Bundkoo*, 22 W. R., 87; *Nowab*, 24 W. R. 70, followed.

APPPEAL from the order of the Sessions Judge of Rungpore, convicting and sentencing the Appellants under Section 330 of Indian Penal Code.

The points taken by the Appellants are sufficiently stated in the judgment of the High Court', which was delivered by

KEMP, J :—

KEMP, J.

These parties have been convicted under Section 330 of the Penal Code by the Sessions Judge of Rungpore, and have been sentenced to various terms of imprisonment. The objection taken by the learned Counsel, Mr. Ghose, who appears for the appellants, is that the direction of the Judge for the committal of the prisoners under Section 330 of the Penal Code, was without jurisdiction, and that the committal and trial ought to be quashed.

The original complaint was made of offences under Sections 323, 342 and 383, the last being the section defining the offence punishable under Section 384. The complainants were examined, and the case was made over for trial to the Deputy Magistrate, Mr. Rattray. Mr. Rattray recorded evidence in the case, and expressed a very decided opinion that the case was a false case, and that the evidence, to use his own language, was fabricated. He dismissed

¹ KEMP and MORRIS, J.J.

1877

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NATH BHUT-
TACHARJEA
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Judgment.

KEMP. J.

the case under Section 147, Criminal Procedure Code. Upon this, one of the complainants, named Fool Nushyo, petitioned the Judge who was holding the Sessions at Bograh on circuit, and the Judge, without giving notice to the parties who were accused, directed the Deputy Magistrate to commit the accused for trial under Section 330. The Judge, in his order directing this committal, observes that the case is a Sessions case, and had not been sufficiently inquired into. Now the complaint has been dismissed under Section 147 of the Code of Criminal Procedure; and, although under that section the dismissal of a complaint does not prevent subsequent proceedings, it has been held by this Court, in decisions to be found in Vols. XXII. and XXIV of the Weekly Reporter, pages 67 of Vol. XXII, and 70 of Vol. XXIV, that before a Sessions Court can direct the committal of a party against whom a complaint has been dismissed by the Magistrate, that Court is bound to give him notice of the application for such committal, and an opportunity of showing cause why the committal should not be made. That course of procedure has not been followed in the present case; and further, if the Judge was of opinion that the case had been dismissed without sufficient enquiry, he ought to have proceeded under Section 298, which directs that, if the Court of Session is of opinion that a further inquiry should be made into a case which has been dismissed under Section 147 it may direct the Magistrate, or any other officer subordinate to the Magistrate, to make such further enquiry into the complaint which has been so dismissed.

We think, therefore, that the order of the Judge, directing the committal of the petitioners, is bad in law and without jurisdiction. We, therefore, quash the proceeding, set aside the sentence, and direct that the prisoners be released.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF DEDAR BAKSH AND } PETITIONERS.
 HALAL CHOR }

1877
 May 10.
 June 18.

Security for good behaviour—Section 509, Code of Criminal Procedure—Mode of fixing the amount.

The amount of the security to be furnished for good behaviour should be such as to afford the person a fair chance of complying with the order, so as not to make the alternative imprisonment unavoidable. Such imprisonment is not as a punishment for a crime committed, but as a protection to society against the perpetration of a crime by the individual on his failing to furnish other security. When the amount of security required is *prima facie* unreasonable the High Court can call upon the Magistrate to certify the grounds for fixing that amount—4 Mad. xlv App., approved and followed.

THE petitioners were ordered under Section 505, Code of Criminal Procedure, by the Magistrate of Dinagapore to furnish security for his good behaviour—the first petitioner in two respectable and sufficient “securities in the sum of five thousand rupees a piece,” the second petitioner in “two respectable and substantial securities in the sum of one thousand rupees each,” and it was further ordered “that in default, either of them be rigorously imprisoned for one year.”

For Petitioner: *Baboo Judoonath Banerjee.*

For Govt.: *Baboo Jugdanund Mookerjee (Junior Govt. Pleader).*

On application to the High Court, as a Court of Revision, to set aside these orders as illegal and unreasonable, and on perusal of the record, the following order was passed by

PRINSEP, J., (MARKBY, J., concurring):—

PRINSEP, J.

Objection is made to these orders on the ground that the amounts fixed are excessive and unreasonable, and more than these persons can be expected to furnish.

We have no means of learning the grounds on which the Magistrate fixed those amounts, but *prima facie*, they do appear to be

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more than persons in the position of the petitioners can be reasonably expected to furnish, and we therefore desire that the Magistrate do state the grounds or information on which he so acted.

On receipt of the Magistrate's reply the High Court (AINSIE and McDONELL, J.J.) delivered the following judgment :—
June 19.

We think that, under the circumstances stated by the Magistrate, it is not desirable that this Court should interfere in the present case.

In the 4th paragraph of his letter the Magistrate expresses a doubt whether the High Court is competent to call upon him to state the grounds upon which he fixed the amount of security. With reference to this we desire to call his attention to a ruling of the Madras High Court,¹ at page 450 of Mr. Prinsep's edition of the Code of Criminal Procedure, an expression of opinion in which we entirely concur. It is there said, "the imprisonment is provided as a protection to society against the perpetration of crime by the individual and not as punishment for a crime committed, and being made conditional on default of finding security, it is only just and reasonable that the individual should be afforded a fair chance at least of complying with the required condition of security." If the Magistrate had declined to furnish a statement of the grounds upon which he fixed the amount of security, this Court would have been unable to say that he had fixed it on just and reasonable grounds, and probably the result would have been that we should have felt bound to modify the order as *prima facie* unreasonable and unsupported by anything before us.

¹ 4 Mad. XLVI App.

[PRIVY COUNCIL.]

SRI GAJAPATHI NILAMANI PATTA MAHA }
 DEVI GARU ... } DEFENDANT,
 AND
 SRI GAJAPATHI RADHAMANI PATTMA }
 MAHA DEVI GARU ... } PLAINTIFF.

1877
July 3.

Mitakshara Law—Rights of Junior Widow—Partition—Maintenance.

Under the Mitakshara law the sound rule of inheritance is that two or more lawfully married wives (patnis) take a joint estate for life in their husband's property, with rights of survivorship and equal beneficial enjoyments.

Widows so taking a joint interest in the inheritance of their husbands have no right to enforce an absolute partition of the joint estate between themselves. Nevertheless, there may be no objection to an arrangement for separate possession and enjoyment, leaving the title to each share unaffected; especially, where the nature or situation of the property, or the conduct of the parties, makes such an arrangement eminently desirable.

Ohellummal vs. Munummall (the *Salem case*), *Strange's Hindu Law*, Vol. II, p. 90; and *Jijoyiamba Bayi Saiba vs. Kamakshi Bayi Saiba* (the *Tanjore case*), 3 Mad., 424, cited and approved.

Bhugwandeem Doobey vs. Myna Baez, 11 Moore, 487; 9 W. R., 23, P. C., discussed.

APPEAL from a decision of the High Court of Judicature at Madras.

The facts of the case are sufficiently set forth in the judgment of their Lordships,¹ which is as follows:

This is an unfortunate case, inasmuch as, though reduced to a question of the interest of two Hindoo widows in that which seems to be an inconsiderable estate, it now comes for the third time before this tribunal. *Judgment.*

It is not necessary to go at any length into the earlier history of the case. It is sufficient to say that the litigation arose out of the construction to be given to the document constituting a certain family arrangement by which Gopinadha and Krishna, the two sons of one Padmanabha, had held the talook Tekkali.

Sir J. W. COLVILLE, Sir BARNES PEACOCK, and Sir MONTAGUE E. SMITH.
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—
Judgment.

Each of these sons appears to have questioned at one time the legitimacy of the other, but ultimately their disputes were settled by this family arrangement, and after the death of the surviving brother, Gopinadha, his widow took exclusive possession of the whole talook. The question then arose whether she was entitled to hold that possession, one of the widows of Krishna claiming his share, and certain illegitimate sons of the two brothers also claiming to share in the estate. The construction of the document came before the Courts in India; and the High Court of Madras, dealing chiefly with this clause of it: "If the legal widows of both of them should have no male issue, and if there be any sons born out of wedlock, the talook shall be divided in equal shares," declared that on the true construction of the agreement the estate was to be equally divided between the wives and the sons born in concubinage, and remanded the suit to be treated as a suit for the administration of an estate, directing the Civil Judge to inquire who were the parties "entitled on the construction aforesaid, and to make the parties to the present suit and to Regular Appeal 26 of 1862, and all other claimants, parties to that inquiry."

The case went down upon that remand, and the present respondent having come in and claimed to be a widow of the younger son, Krishna, the Civil Court found that the estate was to be divided into five equal portions, one of which was to be given to the possession of each claimant, those claimants being the two illegitimate sons, the two widows who had been parties to the previous litigation, and the widow Radhamani, who had come in in order to establish her title upon the inquiry.

Immediately after the passing of that order, the appeal to Her Majesty in Council appears to have been allowed, and it came on in due course in the year 1870,¹ and this Committee, putting a different construction upon the family arrangement, and in particular on the clause which has been read, ordered that the decree of the High Court should be reversed, and "a decree made declaring that, according to the true construction of the agreements of the 26th November 1838 and 29th July 1844, the widow of Gopinadha, the appellant, and the respondent, the widow of Krishna, upon the deaths of Gopinadha and Krishna without male

¹ 14 W. R., 33, P. C. ; 6 B. L. R., 202.

issue, became entitled from and after the death of Gopinadha as Hindoo widows, each to one moiety of the estate; and decreeing possession of the moiety claimed to the respondent, Nilamani Patta, but without costs." In the course of that judgment, which was delivered by Lord Cairns, it was observed: "The result of this inquiry," that is, the inquiry directed by the High Court, "has been that, two other illegitimate sons having been reported to exist, the estate has been decreed to be divided into five shares, to be enjoyed equally by the two widows and three illegitimate sons respectively." The inaccuracy in this statement may be accounted for by the fact that the order of the Civil Judge, which was all that appeared on one of the records, does not specify who the five claimants were. It is true that in another of the records, there being altogether three, it appeared more distinctly from the judgment of the Civil Judge, upon which his order was made, that he had found there were not three illegitimate sons and two widows, but three widows and two illegitimate sons. The Committee, however, was not set right at the time by the counsel on the appeal, who were probably equally deceived, and thought that the effect of the Judge's order was correctly stated.

In that state of things the first order of Her Majesty went out to India to be executed. Difficulties then arose, and the execution of part of the order was suspended until the widow Radhamani, who may be called the junior widow of Krishna, should have applied to this Board in order to have any misapprehension concerning the effect of the first order of Her Majesty corrected. That application was opposed by the other widow, Nilamani. The rights of the widow of Gopinadha had been finally determined, and she had disappeared from the litigation. Their Lordships' report to Her Majesty on this application was in these terms: "Their Lordships being of opinion that the respondent Nilamani Maha Devi represented in these appeals not only her own interest but also the interest of all the lawful Hindoo widows (if more than one) of Krishna, and that the order of Your Majesty of the 9th August 1870, declaring the title of Nilamani as Hindoo widow to the moiety of the estate, was an order enuring to the benefit of any other (if there should be found to be any other) such lawful widow, and that the High Court, executing the said order, ought

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to have taken and ought now to take all necessary steps to give to the petitioner (if one of such lawful widows of Krishna) such share, interest, or other benefit as under the law applicable to the case she would have been entitled to as such widow, along with Nilamani, of, in, or out of the one moiety of the said estate and the profits thereof, do not think fit to advise Your Majesty to make any further order in the present petition." This report was confirmed by an order in Council of the 3rd of March 1873; and the case then went back, and the High Court, having to execute the original order of Her Majesty, as explained by this subsequent order, made the order of the 11th March 1874, which is the subject of the present appeal.

Before considering the particular terms of that order it may be desirable to see what are the objections that were taken to it in India and at their Lordships' bar. It was contended that the High Court was in error in treating as an ascertained fact that Radhamani was a widow—in the proper sense of the term—of Krishna, and that it ought to have directed an issue in order to ascertain whether she was the lawful widow of Krishna, or whether her connexion with him was only by means of a *gandharva* marriage, which would not be a valid marriage according to Hindoo law. The other point was that, assuming her to be a widow, she was only a junior widow, and therefore, under the Hindoo law, was only entitled to maintenance. Hence, the two points raised in the Court below, and the two principal points now raised before their Lordships, concern, first, the status of Radhamani as a widow, and, secondly, her rights, if a lawful widow of Krishna.

Their Lordships are of opinion that, as far as the status of Radhamani is concerned, the finding of the Court below is correct, and that it was not bound to direct any further inquiry upon that point. It appears to their Lordships that there was a sufficient *contestatio litis* between the two parties upon the inquiry which was directed to the Civil Court, to make the finding of that Court binding on both widows. It follows that there having been no appeal, it would have been conclusively found between those two persons, but, for the effect of any order of the Crown that has since been made, that Radhamani was a joint widow with Nilamani. It



is contended, however, that the effect of that finding has been swept away by the first order of Her Majesty in Council. That argument appears to their Lordships to be erroneous. The judgment on which the order in Council was founded, although it recognized the proceedings which had taken place before the Civil Judge, did not in terms recommend the reversal of his finding. The order reversed no doubt the decree of the Court which made the remand, and substituted a new decree for it, but by that new decree it directed the High Court to "take all necessary steps to undo what may have been done under the decree reversed inconsistent with the rights thus declared." It, therefore, by implication assumed that things might have been done under the decree which were not inconsistent with the rights declared, and that what had been so done was to remain; and, if the decision ascertaining the *status* of the *widow* was to remain, it would have been a very idle proceeding on the part of the High Court to institute a new inquiry in order to retry that question. It is, however, contended that at least the second order of Her Majesty in Council has made it imperative upon the High Court to take the course which the appellants argue ought to have been taken. That order simply confirmed the report, which is more in the nature of an expression of opinion than of an order, is very cautiously expressed, and seems to avoid the decision of any question in the cause. It certainly did not order the High Court to institute any inquiry which would otherwise be unnecessary. It declared that the former order was to enure for the benefit of all the widows, if more than one, of Krishna, "and that the High Court executing the said order ought to have taken and ought now to take all necessary steps to give to the petitioner (if one of such lawful widows of Krishna) such share, interest, or other benefit as under the law applicable to the case she would have been entitled to." This assumes that the Court ought to have taken proceedings in order to ascertain the number of Krishna's widows; and if it had in fact done so by means of the inquiry directed by the original decree, it can hardly be said to have been afterwards in error in treating as conclusive evidence of the status of Radhamani the finding of the Civil Court which stood unreversed. Their Lordships desire to add that they would have been extremely sorry to

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find themselves compelled to give way to any technical objection founded upon the mere words of the order in Council, since from the other earlier proceedings which have been put in by the appellant, for another purpose, it appears clearly that, as early as the year 1856 or 1857, there were disputes between these ladies about a certificate and other matters; that in the proceedings arising out of those disputes there was no serious contest as to the status of Radhamani as the junior widow of Krishna; and that the suggestion that she was not lawfully married to her husband seems to have been an after-thought.

Having disposed of this first objection, it now becomes necessary to consider what are the legal rights of Radhamani; whether she has a right to share, as one of the widows, jointly and upon the same footing with the other widow in the enjoyment of her husband's estate; or whether, as she is junior widow, her right is limited to maintenance. Their Lordships have already, in the course of the argument, intimated that this question was perfectly open to the appellant; and was in no degree concluded by the order of Mr. Morris, the Civil Judge, which has been already alluded to, because his finding that the estate was to be divided into fifths, though consistent with the construction put upon the family arrangement by the High Court, which divided the estate among the members of a certain class *per capita*, was inconsistent with the order of Her Majesty in Council which divided the estate into moieties, giving the share of each brother to the widow or widows of that brother. This point of law has now been ably and fully argued before their Lordships, and in their opinion the law of Madras must be taken to be in accordance with the decision in the 3 Mad., 424, in what may be called the *Tanjore case*. That there had been a notion that the law of Southern India on this point differed from the law of Hindostan, it is impossible to deny; but that notion seems to have been mainly founded upon the passages which have been cited from the work—a work of very high authority—of Sir Thomas Strange. Those passages are open to the observations that have been made upon them, namely, that even Sir Thomas Strange seems, by his note on the first passage, to have thought that the proposition was in some degree questionable;

and that, although the doctrine is repeated in the subsequent passage without qualification, it is not consistent with one of the cases which are set forth in the 2nd volume, viz., the *Salem* case, at page 90, or with the opinion of the pundits and the opinion of Mr. Colebrooke, there stated.

There are, however, two decisions which are relied upon as having been made consistently with the doctrine laid down by Sir Thomas Strange, and which it is argued settled up to a certain time the law of Madras. It appears, however, to their Lordships that, although the learned Chief Justice in his elaborate judgment in the *Tanjore* case accepts those cases as decisions in point and as confirmatory of the doctrine laid down by Sir Thomas Strange, they really are not authorities of that character. The first of them is clearly a case in which the question was which of several widows was to succeed to an impartible zemindary which could only be held by one. It appears upon the face of the report that that zemindary had been held by two brothers in succession, and therefore there can be no doubt that the subject of the litigation was an impartible zemindary. That was the last of the decisions and was passed in 1835. In the other decision, which is of as early date as 1824, the subject of litigation would seem to have been also a zemindary; but the contest there was not between several widows, and did not relate to their rights *inter se*. A person claiming as nearest male heir had obtained possession of the zemindary, and had been ejected by the eldest widow of the zemindar. At her death this male claimant appears to have regained possession, and the question was whether the right of the elder widow had not survived to the second widow. It was held that it had so survived, and therefore the decisions merely affirmed the proposition of law, that, where there are two or more widows, there is a right of survivorship between them. On the other hand, their Lordships find that, in that portion of India which is emphatically governed by the Mitakshara, namely, Benares, it is settled law that the widows take jointly. This view of the law is also consistent with Mr. Colebrooke's own opinion as expressed in the *Salem* case. In order to support the appellant's contention it ought, in their Lordships' opinion, to be shown either by a course of decision, by custom, or by reason of

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some treatise which is of authority in Madras and not in the north of India, the law of Madras is different from what it is in the north of India. Their Lordships have dealt with the only two decisions cited; so far as treatises go, the *Smriti Chandrika*, which is of authority in Madras, seems to show the contrary; and, although the authority of the translation of that treatise has been impugned by Mr. Leith, his argument at most would show that the *Smriti Chandrika* is not a conclusive authority against him; it certainly would not show that that treatise is an authority in his favour. It seems to their Lordships by no means impossible that, as has been argued by Mr. Mayne, the *dictum* of Sir Thomas Strange was founded upon a misapprehension of the law that prevails in Bengal as laid down by Jimûta Vâhâna. The proposition is not confirmed by the *Mitakshara* or by any treatise of paramount authority in the presidency of Madras, and it is to be observed that in Mr. Strange's Manual, published as early as 1856, and in other works, the accuracy of the law, as laid down by Sir Thomas Strange, appears to have been questioned. It is, therefore, incorrect to say that the settled law of Madras was first changed by the decision of the *Tanjore case* in 1867.

Their Lordships think that, in this state of the authorities, they would not be justified in treating the *Tanjore case* as improperly decided, or in dissenting from the proposition which the learned Chief Justice finally expressed in these words: "On this review of the authorities we come satisfactorily to the conclusion that the sound rule of inheritance is that two or more lawfully married wives (patnis) take a joint estate for life in their husband's property, with rights of survivorship and equal beneficial enjoyment." As to the mode of enjoyment, it has no doubt been decided, both in the *Tanjore case* and in the case reported of *Bhugwandee Doobey vs. Myna Bae*,¹ that widows taking a joint interest in the inheritance of their husbands have no right to enforce an absolute partition of the joint estate between them. But in the *Tanjore case*, after affirming this proposition, the learned Chief Justice said: "But we are at the same time of opinion that a case may be made out entitling one of several widows to the relief of separate possession of a portion of the inheritance."

¹ 11 Moore Ind. App., 487; 9 W. R., 23, P. C.

We have no doubt that such relief can and ought to be granted when, from the nature or situation of the property and the conduct of the co-widows or co-widow, it appears to be the only proper and effectual mode of securing the enjoyment of her distinct right to an equal share of the benefits of the estate." It also appears that in the case in 11 Moore Ind. App., 487, the widows had made what was called a partition; that they had separately enjoyed their respective shares of the estate during their joint lives; and that it was not until the death of one of them that the question arose whether she had a right to dispose of her share, and whether if she had no right to dispose of it, it did not pass by survivorship to the other widow. It was held that there was no objection to a transaction which was merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected; although the widows nevertheless remained co-parceners, with a right of survivorship with them, and there could be no alienation by one without the consent of the other. Their Lordships make these observations in order to meet the objection which, though not raised by the petition of appeal, and apparently never raised in the Court below, has been taken to the form of the decree. They think it sufficiently appears that in this case the state of things contemplated by the *Tanjore case* exists; that these widows could not go on peaceably in the joint enjoyment of the property; and that they have acted as if they had agreed that they are separately to enjoy, in the manner above indicated, their respective shares. Therefore, their Lordships guarding themselves against being supposed to affirm by this order that either widow has power to dispose of the one-fourth of the estate allotted to her, or that they have any right to a partition in the proper sense of the term, are not disposed to vary the form of the order under which one-fourth of the profits of the estate will go to each widow during their joint lives, their respective rights by survivorship and otherwise remaining unaffected.

The only other point that was taken is that which relates to the costs of the former litigation, and their Lordships upon that are of opinion that whatever equity the widow who conducted the litigation might originally have had to recover a portion of the costs from the younger widow, that equity cannot be said any

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longer to exist in this case, in which the elder widow; who, if considered to have sued as a trustee for the younger widow, has long and persistently repudiated any such trust; and, by resisting the claim of the younger widow, has occasioned all the costs of the litigation that has since taken place.

Upon the whole, then, their Lordships are of opinion that it will be their duty to advise Her Majesty to affirm the order under appeal, and to dismiss the appeal, with costs.

Judgment.

[PRIVY COUNCIL.]

ADMINISTRATOR-GENERAL OF BENGAL. PLAINTIFF;
 AND
 JUGGESSUR ROY, AND OTHERS DEFENDANTS.

1877
 July 12.

Fraud—Misrepresentation—Concealment.

A transaction will not be set aside merely on the ground of inadequacy of consideration, unless the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition.

Tennent vs. Tennent, Law Rep., 2 Scotch Appeals, 6, cited and followed.

APPEAL from a decision of the Calcutta High Court, PONTIFEX and BIRCH, J.J., dated the 21st of June 1875.

The facts of the case are sufficiently set forth in the judgment of their Lordships, which is as follows :

This suit was instituted by Mr. Robert John Jackson, who upon his death has been succeeded on the record by the present plaintiff, for the purpose of setting aside certain conveyances by him to the three first defendants of his interest in Mouzah Luchhipore, in the district of Ranigunge, on the ground, in the first place, that he was under age, and in the second place, that he was induced by the defendants, who were trusted servants, but who had abused their fiduciary character, to part with his property without fully understanding the nature of the transaction, and without adequate consideration. Mr. Robert John Jackson was the adopted son of a Mr. Robert Gwynne Jackson (who will be called Mr. Gwynne Jackson), who appears to have been of European extraction. The date of his adoption is one of the questions in the cause, the plaintiff alleging the adoption to have been about the year 1855, and the defendants as far back as 1850. Mr. Gwynne Jackson appears to have resided a great number of years in the neighbourhood, and to have been well acquainted with coal mining. He, in 1860, was the manager of the coal mines of Messrs. Apar and Company,

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who, it may be observed by the way, entered into an agreement with Jackson, the plaintiff, to supply him with funds for prosecuting this suit, in consideration of, in the event of his succeeding, his granting them a coal lease.

Mr. Gwynne Jackson left the employment of Messrs. Apcar and Company in 1860, on account of their being dissatisfied with him, but he continued afterwards up to about 1867 to some extent in their employment in a subordinate capacity, when he finally left it. He appears to have acquired some property, and to have been interested in other coal mines in the neighbourhood.

Shortly before the year 1860, which is the first date material in this case, Mr. Gwynne Jackson bought certain putnee and durputnee rights, including the coals in Mouzah Luchhipore, partly from the defendants. It is not disputed that by a deed, bearing date the 20th September 1860, he, being such putneedar and durputneedar, granted certain sub-tenures by way of durputnee and seputnee, reserving the minerals, to three of the defendants; but one question in the cause has been, whether that deed was executed at the time it bears date, or at a later date not very clearly indicated on the part of the plaintiff, but which the Judge in the Court below has found to be the year 1869.

Gwynne Jackson made a will in 1868, leaving all his property to his son. Subsequently in 1868 he executed a *hibba*, which would have the effect of revoking that will, giving all his property, some of which had been acquired since the date of the will, to his son, and in fact denuding himself of all his property, if that *hibba* is to be taken as intended by him to be then operative.

The deeds, the subject of this suit, were executed in 1870 and 1871, and the last in 1872. These deeds may be divided into two classes. One class is that in which the plaintiff confirms the durputnee and seputnee rights, which were dealt with by the deed bearing date the 20th September 1860; the other class of deeds, which bear date in 1871, and one of them as late as June 1872, are deeds of sale, whereby he transfers all the superior interest which he had, together with the minerals which had been reserved in the former deeds.

With respect to one of the main questions in this case, which has been already indicated, namely, whether the conveyance, bearing

date the 20th day of September 1860, was executed then or at a subsequent date, their Lordships have intimated in the course of the argument, that, on the whole, they concur with the finding of the High Court that that deed must be taken to have been executed at the time when it bears date. If that be so, being prior in time to the *kibba*, it is unaffected by that instrument, and the subsequent deed of 1870, being merely confirmatory of it, and conferring on the defendants no greater interest than they took under it, is obviously of no importance, and may be allowed to stand with it.

The question remains whether the deeds of 1871 and 1872, conveying, as has been before stated, the remaining and superior interest, together with coals, are to be set aside on any of the grounds which have been alleged. With respect to this point their Lordships also intimated, during the course of the argument, that they saw no sufficient reason to differ from the conclusion of the High Court that the plaintiff had failed to sustain the burden of proof which lay upon him that he was a minor at the time of the execution of these deeds.

The question then arises, in the first place, whether it has been shown that the three first defendants (for it should be stated that the two last defendants are the sub-lessees under them) were in a fiduciary capacity or character to the plaintiff at the time of the execution of these deeds, and were therefore in a position to exercise undue influence over him. Upon this question their Lordships also have come to the same conclusion as the High Court. There is indeed some evidence that Haradhun. Misser, the father of Juggeswar Misser, and the two Roy defendants, were at times employed in collieries in which Gwynne Jackson had a share; and there is also some evidence of the latter having acted as his gomasthas with respect to the property comprised in the deed of 1860, but the decision which their Lordships have come to, concurring with the High Court, on the subject of this deed, in a great measure disposes of this class of evidence. Their Lordships see no reliable evidence on the record that, at the time of the execution of these documents by the plaintiff, they were in any fiduciary character towards him, or in a position unduly to influence his judgment. If that be so, the question is narrowed to whether a fraud was practised upon him.

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It is contended, in the first place, that the nature of the transaction was misrepresented to him; that the defendants represented to him that he was not parting with his mining rights by these deeds, whereas he was, and that the deeds were not explained to him; further, that the sale price was inadequate.

With respect to the deception so alleged to have been practised upon him, the only evidence to be found of it is the evidence of the plaintiff himself, and that evidence is described as untrustworthy by the learned Judge of the inferior Court, who found in the plaintiff's favour. There is no confirmatory evidence of this, and there is contradictory evidence to the effect that the deed was read over and explained to him, and that he understood the language in which it was written.

The question then reduces itself to whether there was such an inadequacy of price as to be a sufficient ground of itself to set aside the deed. And upon that subject it may be as well to read a passage from the case of *Tennent v. Tennent* (2nd Law Reports, Scotch Appeals, p. 9,) in which Lord Westbury very shortly and clearly stated the law upon this subject. He says: "The transaction having been clearly a real one, it is impugned by the appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration, but it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition."

Their Lordships are unable to come to the conclusion that the evidence of inadequacy of price is such as to lead them to the conclusion that the plaintiff did not know what he was about, or was the victim of some imposition. It should be borne in mind that his father Mr. Gwynne Jackson was at hand, and their Lordships concur with the view of the High Court that Mr. Gwynne Jackson, by the *hibba* of 1863, did not intend to denude himself of all his property in favour of his son, whom he represents at that time to have been eight years old, and who could not have been more than twelve or thirteen. It probably was a device for the purpose of defeating existing or possibly future creditors. Gwynne

Jackson himself acted in contravention of that deed, for he sold a property soon after its date without any reference to it, and there is evidence that he continued to act as if he were the owner of the property. Gwynne Jackson was very conversant with coal-mining and the character of property in the district, and their Lordships are not satisfied that he was unable to manage his own affairs, or to give competent advice to his son until the year 1872, in the early part of which he was admitted to an hospital with an incurable disease, of which he died in about the middle of that year. He had granted his property to his son by a *hibba*, intending nevertheless to keep in his hands the control of it through his life, but very probably intending it to operate after his death in favour of his son. His son no doubt had an interest in the property as well as himself, and probably the true view of these transactions in 1870 and 1871 is that they were in substance joint transactions by the father and the son. Their Lordships cannot, therefore, regard the son at these dates as altogether in the position of a minor without any one to advise him. It may be observed that the deed in 1872 was but the completion of the previous transactions.

Independently, however, of this consideration, it cannot, their Lordships think, be said that the purchase-money was so grossly inadequate that its inadequacy amounts to proof of an imposition upon the plaintiff. It is true that there is some evidence, the value of which it is difficult precisely to estimate, that property with coal sold in the neighbourhood for some years' purchase greater than the number of years' purchase for which this property sold, which was with respect to a portion of it twelve years' purchase, and with respect to another portion of it ten years' purchase, and there is evidence, which perhaps is the strongest on this part of the case, that soon after the purchase by the defendants, they let a portion of this property on mining leases at a considerable rental, or more, properly speaking, royalty. It should be observed, however, that these leases give the power to the lessee to terminate them at any time, and *non constat* how long the high rental would continue.

It has been suggested that the defendants must have known that there was coal under the land, and that they concealed their knowledge from the plaintiff. Even if it were so, putting aside their fiduciary character, and in the absence of any proof of fraud, that would

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not be enough or vitiate the transaction; but in point of fact their Lordships can find no evidence of this. All the evidence is the other way, namely, that they did not discover the coal until after they had made the purchase; and it may be observed that Gwynne Jackson himself had tried for coal without being able to discover it. It appears, therefore, to their Lordships that this last ground on which it is sought to impeach the validity of the deeds also fails.

On the whole, therefore, their Lordships are of opinion that the High Court was right in affirming the validity of these deeds and dismissing the plaintiff's suit; and they will therefore humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal dismissed, with costs.

[PRIVY COUNCIL.]

MAHARAJAH PERTAB NARAIN SINGH . . PLAINTIFF,
 AND
 MAHARANEE SUBHAO KOOER, AND OTHERS . DEFENDANTS.

1877
 July 19.

Act I of 1869, Section 22, Cl. 4—Hindu Will—Revocation by Parol.

Discussion of what is meant by placing one's self in *loco parentis* within the meaning of Clause 4 of Section 22 of Act I of 1869 (the Oudh Estates' Act.)

There is no doubt that the will of a Hindu may be revoked by parol; but there is great danger in acting upon such evidence as is ordinarily produced in the Courts in India in order to establish such a revocation, and those Courts should in every case apply the law with the most extreme caution.

If definitive authority is given to the person with whom a will is deposited to destroy it, that constitutes revocation, even though the instrument be not destroyed.

APPEAL from a decision of the Court of the Commissioner of Fyzabad, Oudh.

The facts of the case are sufficiently set forth in the judgment of their Lordships' which is as follows :

The question raised by this appeal is the right of succession to the taluq of the late Maharajah Sir Man Singh, one of the most considerable, if not the most considerable, of the great landholders of Oudh, whose status and rights are the subject of Act I of 1869. *Judgment.*

The Maharajah died on the 11th October 1870. He had no male issue. His nearest surviving relatives were his widow, the Maharanee Subhao Kooer, a daughter by a deceased wife, and the appellant, the son of that daughter. The Maharajah had also brothers, and brothers' sons, of whom some survived him. His grandson, the appellant, was known in the family as "Dadwa Sahib," by which name he will be generally designated in this judgment.

¹ Sir J. W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

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The property which is the subject of this litigation belonged to Man Singh before the annexation of Oudh. He was one of the first who made their peace with Government on the restoration of the British power in 1858, and his title as taluqdar was duly confirmed by *sunnud*. The estate is said to have been originally one which, according to the custom of the family, was descendible to a single heir, not necessarily determined by the strict rule of primogeniture. It had certainly passed from Buktowar Singh, the preceding proprietor, to his nephew, Man Singh, though the youngest of three brothers. Accordingly, when the lists prescribed by Section 8 of Act I of 1869 were made up, the name of Man Singh, as taluqdar, was inserted in the first and second of those lists.

Some years before the passing of this Act, and on the 22nd of April, 1864, Man Singh, under the circumstances which will be afterwards considered, executed and delivered to the Commissioner of the district, the document at page 8 of the Record, which is in these words :

“ I, Maharajah Man Singh, &c., taluqdar of Shahgunge, Gonda, &c., do hereby declare that, as I have not yet come to any determination as to what boy is to become my successor, I, for the present, declare my wife to become my successor, and inherit the whole of my property, whether moveable or immoveable. She will, until she nominates a successor, have the same power over the property as myself, except that she will not be authorized to make a transfer. There is no partner of mine in my moveable or immoveable property. I have, therefore, executed this will, and deposited it in a public office, that it may serve as a document, and prove of use when required.”

Mr. Simson, the then Commissioner, made the following indorsement on the will : “ April 22, 1864. Maharajah Man Singh this day in person signed this document in my presence, and then delivered it to me as his last will and testament ; ” and wrote on the envelope within which it was enclosed : “ Within this sealed envelope is Maharajah Man Singh’s will. I forward the envelope to the Deputy Commissioner of Fyzabad, with instructions to lodge it, sealed as it is, in the treasury ; and each treasury officer will note it in his receipt on giving or receiving charge-”

Of course, the Maharajah may reclaim this on a written application properly authenticated at any time."

After the death of the Maharajah, and in November 1870, this will was opened, and under it the Maharanee was put into possession of the taluq. She afterwards, by a document dated August 16, 1872, exercised the power which the will gave her of "nominating a successor" in favour of the respondent Triloki Nath, who was a son, then under age, of one of the late Maharajah's brothers, and had married her own niece.

Shortly after this transaction, the appellant, Dadwa Sahib, instituted this suit, praying for a declaration of his title to the succession to the Maharajah's estate, and for the cancellation of the document of April 22nd, 1864 (the will); that of August 16, 1872 (the appointment); and the order of the revenue authorities of November 11, whereby the Maharanee was put in possession.

It is now admitted on all sides, if it were ever seriously disputed, that the appellant can only succeed in his suit by establishing both the following propositions:

1. That the testamentary disposition which the Maharajah unquestionably had power to make, and did make in April 1864, was revoked or became inoperative in his lifetime.

2. That the appellant is entitled to succeed to the taluq as the son of a daughter of the Maharajah, who had "been treated by him in all respects as his own son" within the meaning of the 4th Clause of Section 22 of Act I of 1869; it being clear that, as a mere grandson by a daughter, he would not be the heir *ab intestato* to the taluq under the special canon of succession to intestate taluqdars established by that section of the statute.

The Court of first instance and the Appellate Court in Oudh have concurred in determining the first of these issues against the appellant. The second of them was found in his favour by the Court of first instance; but that decision was reversed by the Appellate Court.

In dealing with this appeal, their Lordships propose to consider, in the first instance, whether the appellant has established that he was treated by the late Maharajah "in all respects as his own son," within the meaning of the enactment in question, and is conse-

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quently the person entitled to inherit the taluq, if the Maharajah died intestate.

The clause is perhaps not very clearly or happily expressed, and considerable doubt appears to prevail in Oudh as to the construction to be put upon it. One passage in the Commissioner's (Mr. Capper's) judgment almost implies that, inasmuch as the actual treatment of a son by his father varies in all countries according to the characters of the parent and the child, it is impossible to say what the Legislature meant by the treatment of a grandson "in all respects as a son." Other passages of the same judgment seem to assume that the treatment must in some way be tantamount to an adoption under the Hindoo Law, involving the legal consequences of such an adoption as, *e.g.*, the subjection of the grandson to prohibitions as to marriage which would not otherwise attach to him. And the appellant's own plaint affords some colour to such a construction, by describing his mother and guardian as his "sister."

Their Lordships are disposed to think that the clause must be construed irrespectively of the spiritual and legal consequences of an adoption under the Hindoo Law. They apprehend that a Hindoo grandfather could not, in the ordinary and proper sense of the term, adopt his grandson as a son. Nor do they suppose that, in passing the clause in question, the Legislature intended to point to the practice (almost, if not wholly, obsolete) of constituting, in the person of daughter's son, a "patrica-puttra," or son of an *appointed* daughter. Such an act, if it can now be done, would be strong evidence of an intention to bring the grandson within the 4th clause, but is not, therefore, essential in order to do so. Moreover, it is to be observed that the 4th, like every other clause in the 22nd section, applies to all the Taluqdars whose names are included in the second or third of the lists prepared under the Act, whether they are Hindoos, Mahomedans, or of any other religion; and it is not until all the heirs defined by the ten first clauses are exhausted that, under the 11th clause, the person entitled to succeed becomes determinable by the law of his religion and tribe.

It is necessary then to put a general as well as a rational construction upon the provision advisedly introduced by the Legis-

lature into this statutory law of succession; and, taking the whole section together, their Lordships are of opinion that wherever it is shown by sufficient evidence that a taluqdar, not having male issue, has so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son, if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment in question.

Their Lordships will now proceed to consider the effect of the evidence as to the treatment of the appellant by the Maharajah.

It is unquestionable that the appellant was from the first brought up in the house of his grandfather, and not in that of his father. This circumstance, of itself, does not go far to prove his case. It may be accounted for by the fact that the social position of the father, though respectable, was very inferior to that of the Maharajah. But, whatever may be its value as evidence, this is a circumstance in the treatment of the boy which involved a departure from the ordinary usages of Hindoos.

On the other hand, it must be admitted on the evidence that the Maharajah had not, in 1864, formed a clear intention that Dadwa Sahib, who was then between 7 and 8 years old, should be his successor.

It has been said that the making of his will was the result of pressure on the part of the authorities. However that may be, the act was a natural one. At that time nothing was definitively fixed as to the course of succession to the newly-constituted taluqs, except that the taluqdars had an absolute power of disposition over them. The family custom which had previously regulated the succession to the Maharajah's taluq was one which implied selection. It was, therefore, in every way desirable that the Maharajah should make some provision as to his successor. The will, which was clearly his own act, indicates that he intended his successor to be a male, though he had not yet made up his mind as to the person. His words are: "As I have not yet come to a determination as to what *boy* is to become my successor." He, therefore, made his wife provisionally his heir, delegating to her

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the power of selection, which, in his then state of mind, he did not feel able to exercise himself.

That state of mind is the more conceivable if we suppose that he had then begun to entertain the notion that Dadwa Sahib should ultimately succeed him. Had he then resolved that the successor should be taken from his male relations *ex-parte paternā*, it would have been comparatively easy to nominate a brother or brother's son. In that case his only reason for delaying his choice would have been the desire to be more fully assured of the fitness of the person selected. But a predilection for his grandson would introduce fresh and more serious grounds for hesitation and delay. Independently of his affection for the boy, he might feel that the estate, being separate property, would, according to the *shasters*, devolve upon him in preference to collaterals, though in the male line. On the other hand, he may have felt reluctant to depart from the family custom and offend his relations by allowing the estate to pass out of his own "gotra:" and if, as is stated on the record, he were a man apt to prefer an indirect to a direct course, he might well determine to shift the responsibility of selection to his widow, to whom he might confide his real and final intentions, trusting to her for the performance of them. That the above was really the state of mind and feeling of the Maharajah when he made his will, appears in some measure from the evidence of Anunt Ram, his dewan, whom the Deputy Commissioner considered to be a trustworthy witness.

In 1867, the ceremony of the janeo, or investiture of the appellant with the brahminical thread, took place. That this was done with considerable pomp in the Maharajah's house, that the Maharajah took that part in the ceremony which, in the ordinary course of things, would be assumed by the boy's natural father, seems to be established. That what was done operated either in law or in fact as a transfer of the boy from his own into the Maharajah's *gotra*, their Lordships, upon the conflicting evidence in the cause, and against the opinion of Mr. Capper, are unable to affirm.

The next important event in Dadwa Sahib's history was his marriage in 1868 to the daughter of Darogha Ramdan. It seems to be clearly established that on that occasion the Maharajah

wrote the two following letters to the father of the bride. The first is in these words :

“ Lallah Tulsiram came to me and verbally mentioned to me all the facts. I have, in my former letter, already stated what I wished to communicate to you, and you should attach great weight to that statement. I had fully weighed all the ups and downs before I embarked in this affair. In short, when I have candidly declared Dadwa to be my heir, and am about to celebrate his marriage, with a view that he may stop here, you can have no cause to entertain any apprehension.

“ The will contains no such derogatory clause as you have heard. Every sentence in it has a peculiar meaning. Moreover, I have made my intentions known to Colonel Barrow, which you should consider quite correct; you should be quite satisfied.”

The other letter is as follows :—

“ I have received your letter and become acquainted with its contents. You have some doubt regarding the marriage of Dadwa, but you know very well that I have declared no one to be my heir except Dadwa, and this is known to the authorities. This is the reason that my brothers are displeased with me. You are entirely in fault. As I have made him my heir, and am about to celebrate his marriage here, how is it possible that any other person can become my successor? Dadwa has no reason to go to his native place. You should rest satisfied, and consider what I write to you to be of great weight. I have fully made my views known to my wife, so you should be satisfied, and make preparations for the marriage.”

These letters, no doubt, are no legal revocation of the will. They seem rather to recognize the continued existence of a will; but they are pregnant evidence to show that the Maharajah's inclinations in favour of his grandson had then ripened into a confirmed intention to make him his successor. They are consistent with the hypothesis that the Maharajah at that time either thought that he had named Dadwa Sahib in the will as his successor, or had instructed his wife to exercise her power of appointment in Dadwa's favour. They are inconsistent with the hypothesis that at that time he was in doubt as to the person who should

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succeed him; or intended to leave to the Maharanee a discretionary power to name any other successor.

There remains, no doubt, the possibility that these letters, written to remove the apprehensions of his correspondent, and in order to bring about the proposed marriage, were written with a dishonest intention to deceive. But nobody has sought to cast upon the Maharajah's character the imputation which such a supposition implies.

These letters hardly require the confirmation supposed to be afforded by what has been called the "red letter," being the invitation to attend the marriage, which was addressed by the Maharajah to the late Nowring Singh, and contains the words: "Do not regard this as a customary invitation. Dadwa Sahib is the light of my eyes, and heir to my property." Their Lordships, however, think it right to state that they see no reason to doubt the genuineness of that document. The original is produced by the widow of the person to whom it was addressed, and it corresponds with a copy of it in the Maharajah's letter-book.

The documentary evidence which has just been considered is far more important, as direct evidence of this intention of the Maharajah, than any parol testimony touching the manner in which the marriage ceremony was conducted. It also goes far to corroborate the testimony of the plaintiff's witnesses on this point, when that is in conflict with the testimony adduced by the defendants.

There is, again, some conflict of evidence as to the fact whether the appellant bore the title of Kooer. There is, however, some evidence that the title was often conceded to him, though he is not uniformly so designated in the Maharajah's own letters. He is so designated in the "red letter." There is also evidence, which their Lordships see no reason to doubt, as to his having on important occasions sat on the *guddee* with the Maharajah; of his having been introduced by the Maharajah's desire to European officers high in authority; of his having been taken to the durbar of the Governor-General and put prominently forward there; and it cannot be doubted that the effect of the Maharajah's treatment of him was to produce a strong impression on the minds of the officials that he was the intended successor.

So matters stood when the Maharajah, as one of the leading members of the British Indian Association of taluqdars, went down to Calcutta in order to take part in the discussions and negotiations which resulted in the passing of Act I of 1869. This must have been in the latter half of 1868.

Imtiaz Ali, the vakil concerned in the drafting and preparation of this Act on the part of the taluqdars, has sworn that Clause 4 of the 22nd Section originated with the Maharajah; that it was opposed by some of the taluqdars, but finally approved of by the Select Committee of the Governor-General's Legislative Council on the Bill, and passed into law. He also says that he was told by the Maharajah that his object in pressing this clause was to provide for the Dadwa Sahib.

There is some contradictory evidence on this point on the part of the defendants. One of their witnesses, however, Chowdree Niamut Khan, at page 63 of the Record, seems to admit that the Maharajah was the author of the clause in question, though he represents that it was inserted for the benefit of Mahomedan rather than for that of the Hindoo taluqdars. He says: "I asked Maharajah Man Singh what the object was of the clause in question, and he informed me that in the absence of a near relation, grandsons on the daughter's side can have no claim under the Hindoo law, but under the Mahomedan law they have; and that the clause in question was inserted with the view that the followers of neither religion might suffer, and that the provisions of the Hindoo law might not be contravened." It is not easy to see why the Maharajah should have been thus anxious to originate a clause that was to enure only for the benefit of Mussulman taluqdars.

The scale, however, is conclusively turned in favour of the testimony of Imtiaz Ali, on this point by the evidence of Mr. Carnegie.

Mr. Carnegie, whatever may be the effect of his evidence upon the questions of revocation, which will be hereafter considered, cannot, their Lordships think, be disbelieved as to the fact that a conversation did take place between him and the Maharajah in January 1870, and that in the course of that conversation the Maharajah did make a statement to the effect that he had had a

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clause inserted in Act I of 1869 to suit the identical case of the Dadwa. That statement is very material, inasmuch as it shows that the Maharajah considered that he had treated his grandson in all respects as a son.

The Deputy Commissioner (Mr. King), speaking possibly in some measure from personal knowledge, says: "It is not saying too much, the Court believes, to say that, if the plaintiff had not existed, the clause, as it stands, would never have been enacted." Their Lordships, weighing the evidence in the cause, and proceeding on that alone, would come to the same conclusion.

It appears, then, to their Lordships that, however uncertain it may be when the notion of making the Dadwa Sahib his successor was first conceived, or when that notion first became a fixed intention, it is established that the Maharajah had that intention as early as the date of the Dadwa Sahib's marriage; that with that intention he continually treated his grandson, in fact, as the son of the house would be treated, and not as a mere grandson by a daughter; and that, in order to effectuate his intention by operation of law, rather than by will, he caused the clause in question to be inserted in the statute.

They are further satisfied that the treatment, in point of fact, was such as the words of the clause, upon the true construction of it, must be held to contemplate; and that, in the events that have happened, the appellant was the statutory heir to the taluq, if the Maharajah is to be held to have died intestate.

They now approach the more difficult question, whether there was a revocation of the will.

If the finding of their Lordships upon the question of "treatment" is correct, it follows that the Maharajah, from the time of his return from Calcutta, would presumably have, with regard to his will, the *animus revocandi*. It is unreasonable to suppose that having been at so much pains to make Dadwa Sahib his heir *ab intestato*, he would wish to leave that arrangement liable to be defeated at the will, and by the act, of the Maharanee. Moreover, his conduct, and what we are told of his character, make it probable that, even if he thought the succession of Dadwa was secured either by the terms of the will, or by further instructions given to the Maharanee, he would now desire it to be effected by

operation of law rather than by a voluntary disposition, certain to offend his relatives in the male line, likely to provoke criticism and censure, and not unlikely to cause dissension and litigation in the family.

Nor have we, in this instance, as in ordinary cases of revocation, to account for a change in the testator's intentions, whereby his bounty is diverted from one object to another. The disposition by this will was, on the face of the instrument, only provisional. It argued no fixed intention to benefit the Maharanee, for it provided for the substitution of a male successor in her place. The Maharajah had since made up his mind who that successor should be, and believed that he had provided for effecting his intention by operation of law. In these circumstances, the provisional disposition by this will, if not an obstacle to the carrying out of his wishes, had at least become useless and superfluous. These considerations render it highly probable that the conversation to which Mr. Carnegie has deposed did pass between him and the Maharajah. Their Lordships will now consider that gentleman's testimony and the objections that have been taken to it.

The passages material to the question of revocation in Mr. Carnegie's deposition are the following :

"He spoke to me about having it (the will) withdrawn from the treasury on the eve of my departure on tour across the Gogra (Mr. Sparks' evidence fixes the date of this as some time in January 1870), and expressed a wish that I should examine the deed and see what provisions he had made for the adoption of an heir. He said he had authorized the Maharanee to name an heir, and it was his wish that the power to adopt or name an heir should be limited to the Dadwa Sahib ; that he was apprehensive that he had given her a personal power to adopt any one of the lads of the family ; and that if, on examination of the document, I found that his apprehensions were just, he wished me to destroy it, because his intention was, and always had been, that the Dadwa should succeed him ; and he had had a special clause inserted in Act I of 1869 to suit the identical case of the Dadwa ; so his wishes would be fully met by the document being destroyed, and the law being allowed to take its course. Next morning I crossed the Gogra on tour, and was absent several weeks. I wrote demi-officially to Mr.

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Sparks, the Deputy Commissioner, to get out the will and send it to me, and I also discussed the subject with the Chief Commissioner, Mr. Davies, who, I remember, said that if the will was sealed up and deposited by the Commissioner, I, as Officiating Commissioner, might open it; but, if sealed and deposited under orders of the Chief Commissioner, I had better not open it myself. Mr. Sparks unfortunately overlooked the matter, and it escaped my memory during the rest of my tour, and when I returned to Fyzabad I found the Maharajah's health, physical and mental, to be such that I deemed it expedient to take no further steps in the matter, and there it remained. This was in the cold weather of 1869-70."

And in cross-examination he said: "The Maharajah wished his will to be destroyed that the Dadwa Sahib might get the benefit of the 22nd Section of Act I of 1869. He said there was no need of the document, as the clause secured his wishes."

The first objection to Mr. Carnegy's evidence is that it is not corroborated by that of Mr. Sparks, which is also given in the cause. He says, touching this point: "To the best of my recollection, Mr. Carnegy never wrote to me to send him the will. Mr. Carnegy, either verbally or by note, asked me to get out the will and see by whom it was deposited. I requested the treasury office to get out the will and see by whom it was deposited, which copy I despatched to Mr. Carnegy. I did not receive any letter, official or demi-official, to return the will to the Maharajah. I did not receive any letter from Mr. Carnegy asking me to return the will, nor did I receive any *khatt* from the Maharajah. I don't remember receiving any."

Upon this testimony, it is to be remarked, that it confirms that of Mr. Carnegy as to the fact that at the time in question he made some communication to Mr. Sparks touching the Maharajah's will, though there is a material discrepancy between the two depositions as to the precise terms and nature of that communication. To that extent then it corroborates Mr. Carnegy's general statement that he had had a conversation with, and some instructions from, the Maharajah about the will, for otherwise there would be no apparent reason for any correspondence between the two officers on the subject. Mr. Carnegy was examined on the 19th April, 1873, when on the eve of his departure for Europe. Mr. Sparks was examined on

the 2nd of the following July, and there was no opportunity of recalling Mr. Carnegy, and getting him to explain, if he could, the before-mentioned discrepancy. It is conceivable that the deposition of each officer may be partially accurate and partially defective; that Mr. Carnegy, after the discussion with Mr. Davies to which he deposes, may have written to Mr. Sparks to the effect deposed to by the latter, and may on another and possibly subsequent occasion have written to the effect to which he himself deposes. The letter or letters (if any) that did pass are not in evidence, and the question of what really passed rests on the accuracy of the recollection of the two witnesses. It may further be observed, as bearing on the general credibility of Mr. Carnegy, that he has expressly sworn to a discussion on this subject with the Chief Commissioner, Mr. Davies. He has, therefore, vouched that gentleman, who might have been called to contradict him and the discussion, if it took place, presupposes that Mr. Carnegy had some instructions from the Maharajah concerning the will.

Other objections to the testimony of Mr. Carnegy are founded on his conduct. It has been asked why, if he had this alleged authority to destroy the will, he did not exercise it; why, after his return from his official tour, he did not even inform the Maharajah (who lived until the following October, and, notwithstanding frequent attacks of epilepsy, was occasionally equal to the transaction of business) that the will was still in existence; and, above all, why, after the death of the Maharajah, he allowed the widow to be put into possession of the taluq, under the will, upon the assumption that the disposition made by it was still in force.

It is impossible to deny that these objections have more or less weight. The following is the explanation which may be set against them. It is clear that the will, from one cause or another, did not reach Mr. Carnegy whilst on his tour; that, according to his own account, he allowed the matter, though of such great importance, to escape his memory, and omitted to press for the despatch of the document; that after his return he found the Maharajah on the occasion of his visit to him in a deplorable state of health, and wholly unfit for business. So far Mr. Carnegy is confirmed by Mr. Sparks. Mr. Carnegy seems then to have jumped to the conclusion that the Maharajah's health, physical and mental, was such

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as to make it inexpedient to take further action in the matter. If this were Mr. Carnegie's sincere conviction, it may well account for his not acting after his return, on the antecedent authority by destroying the will. To destroy a will on the parol authority of the testator would in any case be an extremely delicate matter. A man who would have done the act, if assured that it would be confirmed, if necessary, by a person in the full possession of his faculties, would naturally abstain from doing it, if he felt that the confirmation (if obtained) might be questioned as proceeding from one of enfeebled capacity, if not of absolute incapacity for business. His conviction of the Maharajah's continuous incapacity for business, though erroneous in point of fact, might also account for his omission to renew the subject, or to inform the Maharajah that the will was still in existence. His conduct after the Maharajah's death seems to be explicable only on the assumption that he may have thought the actual destruction of the instrument was essential to its legal revocation; and that, if he objected to the Maharanee's title on the ground of what had passed between himself and her late husband, he would expose himself to criticism and censure without benefiting the Dadwa Sahib, whose interests he may have supposed, in common with other officials, and many of the dependents of the family, would be secured by the Maharanee's exercise of her power in accordance with her husband's intentions.

Their Lordships do not say that this explanation is wholly satisfactory; but the question which they have to determine is not whether Mr. Carnegie's conduct can be completely explained, but whether it be such as renders his evidence untrustworthy. Their Lordships, considering the position and general character of the witness, are of opinion that this is not the case. Upon his general truthfulness neither the Commissioner nor the Deputy Commissioner has cast any suspicion. The former was of opinion that, considering all the circumstances, he could not depend on the accuracy of Mr. Carnegie's recollections of the conversation with the Maharajah. The other Judge says expressly "that the conversation, such as related by Carnegie, passed between him and the Maharajah I have no doubt." Reviewing, however, Mr. Carnegie's subsequent conduct, he came to the conclusion that "Man Singh only expressed an intention that the Dadwa

Sahib should succeed him, and of inspecting his will for the purpose of seeing what he had actually written in it regarding his wife's power to adopt, but did nothing more." He also expresses a doubt "whether, supposing revocation had been clearly proved, it would be proper to let this outweigh the existence of the will," implying that something in the nature of cancellation was necessary. Upon these judgments their Lordships observe that, if Mr. Carnegie be accepted as a truthful witness, the more important portion of his testimony can hardly thus be explained away. His recollection may possibly deceive him as to the terms and nature of his communication with Mr. Sparks; but mere imperfection of memory can hardly account for his imagining that the Maharajah gave him authority to destroy the will if no such authority was given. The authority was in itself a thing so unusual and so important, that the words which conveyed it were likely to stamp themselves on the memory. Nor is it easy to see how such an authority, if not clearly expressed, could be honestly inferred from other words imperfectly remembered. Their Lordships have, therefore, come to the conclusion that Mr. Carnegie's statement of what passed between him and the Maharajah may be accepted as substantially accurate.

If this be so, their Lordships are of opinion that what so passed amounted to a revocation of the will. It cannot, they think, be doubted that the will of a Hindoo may be revoked by parol. The cases cited at the Bar show that this was the law of England before the Statute of Frauds was passed. Their Lordships are very sensible of the danger of acting upon such evidence as is ordinarily produced in the Courts in India in order to establish such a revocation, and they desire to say nothing which may induce those Courts to apply the law in such cases otherwise than with extreme caution. Even in the present case their Lordships have come to the conclusion upon which they are about to act with some hesitation, not because they are not perfectly satisfied that the Maharajah had the *animus revocandi*, but because the testimony of Mr. Carnegie is open to the objections which have been considered. It was hardly disputed at the Bar that, if definitive authority to destroy the will was given to him by the Maharajah, that would be sufficient in law to con-

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stitute a revocation, although the instrument was not in fact destroyed. In truth, the case would then be almost on all fours with that of *Walcott vs. Ochterlony*, 1 Curteis, 580, the only difference being that the authority was given here by words, and there by a writing sufficient to satisfy the Statute of Frauds. In that case, as in this, the authority was not exercised by the actual destruction of the will.

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Their Lordships see no grounds for not accepting that part of Mr. Carnegy's testimony which says that the Maharajah gave him authority to destroy the will, if on examination he should find that it contained a certain disposition. Nor do they think that this qualification of an absolute order to destroy is material, because the will, being what it was, the authority would have clearly justified its destruction; and they are disposed to think that, even if the direction to destroy were not, as upon the whole they think it is, satisfactorily established, the declaration made by the Maharajah, to the principal officer of the district in whose custody the will was, of his desire and intention that the Dadwa Sahib should succeed him by virtue of the newly-passed statute and in supercession of the will, would have been in law a sufficient parol revocation.

Upon the whole, then, their Lordships are of opinion that the Maharajah died, as he intended to die, intestate; that the appellant is the person who, under Clause 4 of Section 22 of Act I of 1869, was entitled to succeed to the taluq; and that he has made out his claim for a declaratory decree to that effect.

The declaration, however, must, their Lordships think, be limited to the taluq and what passes with it. If the Maharajah had personal or other property not properly parcel of the taluqdar estate, that would seem to be descendible according to the ordinary law of succession.

They will, therefore, humbly advise Her Majesty to reverse the decree of the Commissioner of Fyzabad, dated December 24th, 1873, and that of the Deputy Commissioner of Fyzabad dated July 2th, 1873; and to declare that the will of the late Maharajah Man Singh, of April 22nd, 1864, was duly revoked by him in his lifetime; and that the plaintiff, Maharajah Perta

Narain Singh, *alias* Dadwa Sahib, was and is entitled, under Clause 4, Section 22 of Act I of 1869, to succeed, as *ab intestato*, to the taluqdari estate of the late Maharajah, including whatever is descendible according to the provisions of the said statute.

Their Lordships are of opinion that, under the peculiar circumstances of this case, the Commissioner exercised a sound discretion in making the costs of the litigation payable out of the taluqdari estate; and that the costs of both parties of this appeal ought to be taxed as between solicitor and client, and similarly dealt with. And they will advise Her Majesty accordingly.

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[CRIMINAL REVISIONAL JURISDICTION.]

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IN THE MATTER OF KOOKOR SINGH PETITIONER.

Code of Criminal Procedure, Section 505—Bad livelihood—Charge—Notice of precise matter proved—Witnesses—Bail.

A person against whom proceedings for bad livelihood have been taken is entitled to have embodied in a charge the precise matter which the Magistrate considers established by evidence against him. It is not sufficient to say generally that there is suspicion.

He should be asked to produce his witnesses, or offered assistance to procure their attendance.

He should be admitted to bail. A Magistrate is not competent to refuse bail unless the law sanctions such refusal.

THIS was an application to the High Court, as a Court of Revision, to set aside an order of the Magistrate of Dinagepore, requiring the petitioner to give security for good behaviour under Section 505 of the Code of Criminal Procedure.

The facts of this case are sufficiently set forth in the judgment of the High Court,¹ which was delivered by

JACKSON, J. JACKSON, J.:—

We have considered the Magistrate's further proceedings in the case of Kookor Singh, charged under Section 505, Code of Criminal Procedure.

It appears, that, on receipt of the orders of the Division Court quashing the previous decision in his case, Kookor, being released, was immediately re-arrested and placed on bail by the Joint Magistrate on the 18th May.

The Magistrate ordered on the 21st that the case should be heard on the following day, and accordingly on the 22nd the accused was further examined.

The questions put to him were : Whether he had witnesses touching the charge against him, to which he answered that he had.

¹ JACKSON and McDONELL, J.J.

Whether he had anything to answer as to the suspicion against him, to which he answered that he was at enmity with the Darogah and with Joynarain. What quarrel he had with the Darogah? *Answer:* That quarrel related to his demand of the price of some articles of food supplied, which price the Darogah had not paid. Whether his witnesses were in attendance? *Answer:* They are not. Why he had not brought them? *Answer:* They will not come at my request. Whether he had applied for *tulub* (meaning the Magistrate's process) on them? *Answer:* No. Whether he had filed a nominal roll (*ismnavisi*) of them? *Answer:* No! Whether he had any objection to give security? *Answer:* My quarrel with the Darogah. Whose ryot he was? *Answer:* Names his landlord.

The order (of same date) on this is that the accused do remain in *Hajut* (lock up) till 4th June.

A note in the English language signed by the Magistrate, no doubt, says that Kookor Singh is remanded "for such evidence as he can bring," but there is nothing to show that he (Kookor) was made aware of the Magistrate's object or intention in making the order.

Manifestly he was neither asked who his witnesses were, nor whether he now desired the assistance of the Court, though he had already stated that the witnesses would not attend without process. On the day appointed, a pleader appeared on the prisoner's behalf and tendered a list of 16 witnesses for the defence, but the Magistrate, observing that the case had stood over long enough, refused to allow any further adjournment, and, overruling certain objections advanced by the Pleader, made the order now complained of.

Taking this order by itself, *i.e.*, without reference to former proceedings in the case, it appears to us open to the following serious objections:—

1. The accused has really no notice of the precise charge on which he is brought before the Magistrate. He is entitled unquestionably to have the precise matter, which the Magistrate considers established by the evidence against him, embodied in a charge. It is not sufficient to say generally that there is suspicion.

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KOOKOR
SINGH.Judgment.

JACKSON, J.

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KOOKOR
SINGH.Judgment.

JACKSON, J.

2. The accused was, by the Magistrate's procedure, absolutely deprived of the means of defending himself. He was not told that he was to produce his witnesses, or offered assistance in procuring their attendance, or even asked who they were, and when he made application by a Pleader his request was refused on the ground that it was made too late, although he had not been warned to make it before.

3. The accused was without authority of law, put in *Hajut* or close custody, pending the final hearing. The Magistrate justifies this on the ground that the charge is cognizable by the Police. This is no more decisive of the question than is the rule in Section 515 that the evidence is to be taken as in summons cases. The Magistrate is not competent to refuse bail unless the law expressly sanctions the refusal, and it is clear that when the Magistrate, by his final order in the case, has no power to commit the accused to prison except in case of his failure to give bail, he cannot do so, except in the like case pending enquiry.

The illegal order thus made was calculated, and has the appearance of being intended to cripple the accused as to his defence.

It is manifest, therefore, that the petitioner has not had a fair trial, and he is entitled to have the order quashed. These irregularities, however, assume a still more serious character when considered with what had taken place before in the case of the petitioner.

It appears that a previous order of the same Magistrate, based on the very same evidence and enquiry, had been set aside by an order of this Court on the ground set out in Judge's letter or memo. of 12th July.

It might have been expected, therefore, that in dealing further with the case, the Magistrate would have been specially careful to avoid the errors pointed out by the Division Bench.

Instead of this, the errors are repeated with an additional illegality; and the proceedings unfortunately shew not the slightest trace of a desire to afford the accused those advantages to which every person on his trial is entitled.

It is right to add that we are not favorably impressed by the evidence on which the Magistrate based his order, and consequently

we see no reason to think that the release of Kookor Singh will lead to a failure of justice.

Magistrates, who act in the manner exemplified in this case, ought to bear in mind that they not only violate their duty as judicial officers bound to do justice indifferently, but even contravene their own object, as administrative officers, by rendering the supposed offenders objects of sympathy, as well as by ensuring their escape at any rate for the moment. The order is quashed.

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KOOKOR
SINGH.Judgment.

JACKSON, J.

[CRIMINAL REVISIONAL JURISDICTION.]

1877
August 30.

IN RE RAM CHUNDER LALLA . . . PETITIONER.

Recognizance—Forfeiture.

When a Magistrate has before him the fact that a person convicted by him of an offence attended with violence was under recognizance to keep the peace, and does not nevertheless proceed to forfeit such recognizance, it must be held that he thought it unnecessary to do so. Proceedings taken after the lapse of a considerable period are bad and contrary to the intention of the law.

For Petitioner: *Baboo Umbica Churn Bose.*

THE facts of this case are set forth in the judgment of the High Court,¹ which was delivered by

AINSLIE, J. AINSLIE, J.:—

In this case it appears that, on the 1st of November 1875, an order was made on the prosecution of one Roy Kanto Seal, requiring the petitioner to execute a security bond for a thousand rupees for the period of one year. Subsequently the petitioner was charged before the Deputy Magistrate of Mohesrakha, by Goburdhun Manna and Petumbur Bagdi, with the offence of hurt. On the 30th of May 1876 he was convicted and sentenced to pay a fine of twenty rupees.

On the 8th of November 1876, that is, after the expiration of the period for which the recognizance was taken, the Deputy Magistrate, at the instance of Roy Kanto Seal, made an order, calling on the petitioner to show cause why he should not pay the penalty of a thousand rupees on account of the conviction in May, and subsequently, on the 30th of April 1877, he ordered the petitioner to pay that amount.

Now it appears to us that the proceedings of the Deputy Magistrate in the case are bad. The object of the bond was to ensure the keeping of the peace for the period specified in it, that is, for one year. Had the petitioner been called upon within that

¹ AINSLIE and McDONELL, J.J.

period to pay the penalty, it might very well be said that this was done with the view of carrying out the original intention of securing the maintenance of peace for a limited term ; but, after the expiry of that term, the only object of enforcing the order can have been by way of fine as punishment for what had been done before the expiry of the year. In April 1876, when the prosecution by Goburdhun and Petumbur was before the Deputy Magistrate, he had on record the recognizance of the petitioner. It was open to him at that time to pass such order as might seem necessary under the circumstances, for the purpose of punishing and deterring the accused from the commission of any further breach of the peace within the year. If he did not then choose to proceed upon the recognizance, we must take it that he thought that the order directing a fine of twenty rupees was sufficient for all purposes.

Where a Magistrate has taken recognizance from any person, and that person is brought before him within the period covered by the recognizance, he ought, at the time of making an order in respect of the offence alleged on the second prosecution, to take into consideration the fact that there is an outstanding recognizance, and to determine once for all whether he will proceed upon it or not.

When the Deputy Magistrate, in this case, abstained from making any order for forfeiture of the recognizance of the petitioner, it must be taken that he determined not to proceed upon it for that particular instance of breach of the peace.

This being so, it is not open to him to reconsider and add to his order. It is quite clear that in the present instance the exaction of such a penalty, as a thousand rupees, is wholly unnecessary for the purpose of preventing a breach of the peace; and that the proceedings now taken have been set on foot to gratify vindictive feelings on the part of Roy Kanto Seal.

We think that the order of the Deputy Magistrate must be quashed.

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 RAM  
 CHUNDER  
 LALLA.  
 ———  
*Judgment.*  
 ———  
 AINSLIE, J.

## [CRIMINAL REVISIONAL JURISDICTION.]

1877  
August 30.

IN THE MATTER OF BUNWARI LALL MISSER } PETITIONERS ;  
AND OTHERS . . . . . }

AND

RAJA RADHA PERSHAD SINGH . . . . OPPOSITE PARTY.

*Section 530, Code of Criminal Procedure—Order of Magistrate—Limited possession.*

A Magistrate cannot, under Section 530, Code of Criminal Procedure, order that a person be kept in possession until he has reaped the crop standing on the ground, and then that he shall give way to another. When there have been long pending disputes in the Courts he should determine who was in peaceable possession when they commenced.

**T**HIS was an application made to the High Court, as a Court of Revision, to set aside an order under Section 530, Code of Criminal Procedure, passed by the Magistrate of Buxar, a division of the District of Shahabad.

For Petitioners : *Mr. R. E. Twidale.*

For Opposite Party : *Baboo Jugdanund Mookerjee and Baboo Chunder Madhub Ghose.*

The facts are sufficiently set forth in the judgment of the High Court<sup>1</sup>, which was delivered by

**AINSLIE, J. AINSIE, J. :—**

There has been a dispute between the Maharajah of Doornāon and the ryots of certain villages in respect of lands described in the judgment of the Sub-divisional Officer of Buxar as Umarpore Dearah.

On the 30th of November 1876, the then Assistant Magistrate made an order, by which he declared that he had found the Maharajah in possession of 150 bigahs, and the cultivators to be in possession of the remainder, the total quantity of land in dispute

<sup>1</sup> AINSIE and McDONELL, J.J.

being about 800 bigahs. There are no boundaries given, and no means of ascertaining to what this order applies.

The case appears to have been sent up to this Court by the Magistrate of the District; and on the 5th of April 1877, a Division Bench quashed the order on the ground that, as the lands to which it relates are not specified or identified, it must be inoperative.

Thereupon fresh proceedings were taken, and the Sub-divisional Officer, on the 25th of May 1877, made another order, which is the subject of the present motion. He sets out by saying that the case is one for possession of crops standing on about 800 bigahs of land, and for possession of the land. He then states that "the Maharajah is admittedly the proprietor of the disputed land, and further claims to have made the land his *zerat*." He goes on to show how these proceedings originated. He says that they arose out of the petition of one Shonarut Tewary, a servant of the Maharajah, which set out that the ryots of Keshopore and Badkagāon were obstructing him in cultivation. This was on the 9th of October 1876.

Thereupon followed the enquiry and order by the former Sub-divisional Officer, the result of which was to shew that 650 bigahs out of the 800 bigahs were in actual possession of the ryots.

Further on in the judgment he says it is evident that, since October, at all events, the Maharajah through his servant entered upon the land and asserted his title to possession, erected a shed for the use of his servant, and placed some 15 or 20 *peadahs* upon the Dearah; and "this," he says, "is certainly evidence in favor of Shonarut Tewary having succeeded in sowing the *rubbee* crop. Another thing in favor of this is, that some police were stationed in the village to prevent a breach of the peace, and there is no doubt that they have all along shewn a tendency to side with the Maharajah's servant in the case." If that indicates anything, one would suppose that it indicates that the Maharajah's servant was trying, with the assistance of the police, to force the ryots out of the cultivation of the land.

The Assistant Magistrate then goes on to say: "The Maharajah claims possession previously to this, and his witnesses state that the lands have been in *zerat* since Assar before last, or for two years.

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LALL MISHRA  
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PERSHAD  
SINGH.

*Judgment.*

AINSLIE, J.



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BUNWARI  
 LALL MISSEB  
 AND OTHERS  
 v.  
 RAJA RADHA  
 PRASHAD  
 SINGH.

*Judgment.*

AINSLIE, J.

The Missers, however, can produce real receipts, which are genuine ones, for the year 1874, and up to the month of Agrahu 1283, corresponding to December 1875," so that the claim of the Maharajah is simply false, and the Assistant Magistrate says this distinctly. His language is, "I believe that the Missers were in possession of the lands up to December 1875; and, therefore, in all probability, cut and carried the *rubbee* crop in March and April 1876; and, further, I am inclined to believe that they made the first sowings that year, for it is reasonable to suppose, from the course events have taken, that they would not have relinquished the land peaceably and without resistance." Therefore, upon the Magistrate's own finding, up to the period that Shonarut Tewary came in and sought his assistance the ryots were in peaceable possession of the land; and the very fact that he came in and sought assistance from the Magistrate, and apparently has been maintained in possession by the help of the Police, seems to show that the Maharajah was not in peaceable possession at the time that these proceedings commenced.

The Assistant Magistrate goes on to say: "The first sign of anything of this sort occurring was when Shonarut Tewary complained in October; and this, in my opinion, was the first time the Maharajah really attempted to possess himself of the land, at all events with any success." He then goes into a question which he admits has very little to do with the matter under notice, namely, the question of the legal title of the ryots; and he finds that they had no *guzashta* rights. On that finding it is not necessary for us to make any comment; but he says: "It is satisfactorily proved, by the evidence of some respectable stud cultivators, that the Government stud authorities occupied the lands as tenants from Hurlu Baboos, and did what they pleased with it in the cultivation of oats or other corn. It is further proved, by the evidence of Resal Rai, Gopee Rai and Ajoodhya Rai that, after the stud authorities relinquished the land, it was held on a lease by Gopee Rai and Resal Rai, and cultivated partly as *zerat* and partly by tenants-at-will." The words tenants-at-will are used clearly in contradistinction to the term *guzashtadars*; but whether the Missers were in possession as tenants-at-will or *guzashtadars* is wholly immaterial for the purposes of this case, because the only

question here is, whether they were in possession at all; and if in possession, whether that possession had or had not been terminated in a legal manner.

The Assistant Magistrate further says: "Out of the crops at present stated to be standing on the ground the *rahar* and *kapass* (cotton) were sown in Assar last. For the reason mentioned above, I believe that in that month of the year, the lands were in possession of the Missers, and that the crops were sown by them. Therefore, although the land is now in the possession of the Maharajah, I think it is equitable, as well as legally right, to give possession of these crops to the persons who sowed them." And he goes on to make an order in these words: "I, therefore, under Section 530 of the Criminal Procedure Code, order (I suppose the Magistrate means 'declare') that Bunwaree Misser and others are in possession of the *rahar*, *kapass* (cotton) and *raree* (castor-oil) crops at present standing on the Umarpore Dearah, and are entitled to take and retain possession till ousted in due course of law by cutting and carrying away the same; and I forbid all disturbance of possession until such time, and I order that the Maharajah Radha Pershad Singh, of Doomraon, is in possession of all other crops whatever at present standing on the said Umarpore Dearah lands, and that he is in possession of the Umarpore Dearah lands, and is entitled to retain possession till ousted in due course of law."

Now the Magistrate has found that the ryots were in possession; that they sowed the crops; that they are so far still in possession; that they are entitled to reap the crops; and that they are not to be disturbed until they do reap them: and he has not found that their occupancy had been legally terminated. It seems to us that this is a finding, that at the time these proceedings commenced the ryots were the persons in actual and peaceable enjoyment of the land bearing these crops, and that interferences with them, so far as it had gone, had been by one who had never acquired peaceable possession of the land.

How the two parts of the order are to be reconciled we fail to understand. We take it that it is not the intention of Section 530 of the Criminal Procedure Code to give a Magistrate power to declare that a person should have possession up

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LALL MISSEER  
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to a certain period not yet arrived. He has simply to see whether or not he is in possession and entitled to retain it; if so, his possession may be terminated by due course of law, but not by the order of a Magistrate.

Therefore, so far as the land bearing the *rahar*, *kapass* and *raree* crops are concerned, the two parts of the order of the Magistrate are inconsistent and contradictory, and must be set aside. It also becomes necessary to set aside the whole order, because there is on the record nothing which enables us now to declare the extent and position of the particular lands which bear the remaining crops.

If any further proceedings have to be taken in this case we trust that the Magistrate will bear in mind that the question which he has to consider is, Who is the person who has peaceable possession? If contention has been going on from the date of the institution of proceedings in the Court up to the present hour, he must go back and see who was the person who had peaceable possession at the time that these proceedings were first instituted. If a person has been turned out of possession and submits to the ouster, and the other party, whether rightly or wrongly, is in peaceable possession, a Magistrate will not go behind the period where possession may be found to have become peaceable; but the mere fact of seizure and occupation, while complaints are being made to the Police, and proceedings are being held in the Criminal Court, cannot be said to be such peaceable possession as the Magistrate is bound to look to and maintain. A man cannot give himself a title to the aid of the Magistrate by his own wrong doing, except so far as it can be said to have been acquiesced in, and thus to have for the time gained for him the position of a peaceable occupant.

We quash the order of the Magistrate and direct that the proceedings be returned.

## [CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF GOPINATH SHAHA }  
 AND ANOTHER                   ...                   ... } *Convicts.*

1877  
 September 6.

*Homicide—Grievous hurt.—Discretion of Magistrate—Commitment ordered—Conviction set aside.*

Where death has resulted from a violent attack, the Magistrate is bound to commit to the Court of Session, on a charge of culpable homicide not amounting to murder. Conviction of grievous hurt is contrary to law.

THIS case was submitted to the High Court, as a Court of Revision, by the Sessions Judge of Jessore, that the orders of conviction and sentence passed by the Magistrate on Gopinath Shaha and Gungadhur Shaha might be set aside as contrary to law, and an order passed directing the Magistrate to commit those persons to be tried by the Court of Session.

The facts of this case are set forth in the following statement submitted by the Sessions Judge to the High Court :—

“Two persons, named Gopinath Shaha and Gungadhur Shaha, have been convicted by the Assistant Magistrate of Magoorah under Section 325, Indian Penal Code, and have been sentenced on the 27th July, the former to six months,’ and the latter to one month’s, rigorous imprisonment. The term of the latter prisoner has now expired. An application which accompanies has been made by Udhoy Chund Shaha, brother of Hurish Chundra Shaha, deceased.

“I am of opinion that the order of the Lower Court was bad in law, and that it ought to be reversed. The native doctor who examined the body has deposed that, “from the appearance of the body, death was in my opinion caused by rupture of the spleen. The spleen must have been ruptured by violence, and I think the violence must have been very great. The spleen was not sufficiently enlarged to be easily ruptured in any way,” &c.

“There is also evidence which, if true, points to the two accused using violence to the deceased, and to his being trod upon, struck and kicked, and to his dying shortly afterwards.

1877

GOPINATH  
SHAHA AND  
ANOTHER.

—  
*Judgment.*

“The witness, Udboy Chund, brother of the deceased, speaks to a quarrel existing between his brother and the two accused for about two years, &c. The Assistant Magistrate has stated that “the evidence proving the assault is very clear and distinct,” and that he sees “no reason for disbelieving it,” and finds that Huree Shaha died in consequence of rupture of the spleen caused by the blows. In my opinion the aspect of this case is of a serious nature, and should not have been treated as one of grievous hurt, and disposed off by such inadequate sentences as the Assistant Magistrate has thought proper to inflict. The police sent up the case in A. form under Sections 302 and 304, and I do not see that they were wrong in doing so. This is not a case of spleen rupture from a hasty blow, but spleen rupture and death resulting after an attack, and that of a violent nature, made upon him, and no provocation given at the time by the deceased is apparent.

The following judgment of the High Court<sup>1</sup> was delivered by

PRINSEP, J. PRINSEP, J. :—

On the facts found by the Assistant Magistrate this is clearly a case that he should have committed to the Court of Session on a charge of culpable homicide not amounting to murder. We therefore annul the convictions and sentences passed on Gopinath Shaha and Gungadhur Shaha, and direct that the Assistant Magistrate do commit them to be tried by the Court of Session. A warrant should be issued at once for the arrest of Gungadhur Shaha.

<sup>1</sup> MARKBY and PRINSEP, J.J.

## [CRIMINAL APPELLATE JURISDICTION.]

UDH BEHARI NARAIN SINGH. . . . APPELLANT.

1877  
September 13.

*Local enquiry without notice—Proceedings by Sessions Judge after opinion of Assessors.*

If a Sessions Judge should think it necessary to visit the place of the alleged occurrence of an offence under trial, he should give notice to the parties and the Assessors. He should not go without such notice, and after the trial has been completed by delivery of the opinion of the Assessors.

For Appellant : *Branson and Evans.*

For Government : *Piffard.*

**A**PPEAL from a capital sentence passed by the Sessions Judge of Tirhoot.

It is necessary to report only a portion of the judgment of the Court' in the case, which was delivered by

PRINSEP, J., (MARKBY, J., concurring) :—

. PRINSEP, J.

The boy, Juggooa, has given evidence which is of little value, and, looking at his tender years, it does not seem to us to be the evidence of a reliable witness. The Sessions Judge, however, especially relies on this witness, because, when he visited the prisoner's house after the trial had been completed and the Assessors had delivered their opinions, but before he had delivered judgment, the boy "acted his evidence" when called upon to do so. At that time neither the Assessors, who with the Sessions Judge composed the Court at the trial, nor the prisoner, nor the Counsel or other representative of either side, were present. We consider this procedure of the Sessions Judge to be most ill-advised and to be altogether without any authority. The result of this "acting" is certainly not receivable as evidence. We also are of opinion that, if in a Sessions trial the Judge should think it necessary or desirable to visit the place of the alleged occurrence, he should give due notice to the parties, and should proceed thither with the Assessors, and not after the close of the case.

<sup>1</sup> MARKBY and PRINSEP, J.J.

## [CIVIL APPELLATE JURISDICTION.]

1877  
November 28. GUNGARAM DUTT . . . . . DEFENDANT;  
AND  
CHOWDHRY JUNMAJOY MULLICK . . . PLAINTIFF.

*Effect of Remand Order—Prayer for Relief, General and Special.*

Where a party, dissatisfied with the decision of the Lower Court, appeals to the High Court and re-opens the whole case, he must acquiesce in the result finally arrived at by the Court below in accordance with the instructions of the High Court in his special appeal.

It may very well be that a plaintiff, being doubtful as to the precise form of relief, to which the facts proved may entitle him, may ask the Court to give him such relief as under the circumstances the Court may think fit to give.

**SPECIAL APPEAL** against a decree of the Judge of Midnapore, reversing that of the Subordinate Judge.

The plaint in this case, which was a boundary dispute, was filed on the 17th of April 1872. The lands of "*khas* jungle Khurgopur," consisting of 4,645 bigahs, were leased to the plaintiff in 1870, and, on going to take possession of the entire *khas* jungle, he was resisted by the defendants in respect of the disputed land, viz., 1,518 bigahs. This disputed land the defendants claimed as having been settled with, and belonging to, their *ijara* Taotichati; and that the plaintiff's settlement extended only to the jungle lands. The paragraph of the plaint, to which reference is made (as being ambiguous) in the judgment of L. S. JACKSON, J., was as follows: "I bring this suit for recovering possession of, after declaration of my right to, the disputed land as appertaining to the aforesaid 4,645 bigahs of *khas* land of Purgana Khurgopur, calculating the cause of my action to have arisen from the 19th of February 1872." The Judge of Midnapore held on appeal that the lands in dispute were part of Khurgopur; that the whole of Khurgopur had been leased to the plaintiff in 1870; and he gave a decree to the plaintiff for the whole; but, inasmuch as it appeared that the Government had previously settled the disputed lands with the defendants, he held that the plaintiff was not to be entitled to *khas* possession of any part of them, but only to a

decree declaring that he had the same proprietary rights over them as his lessors. The defendant specially appealed to the High Court, who, on the 26th of March 1875, remanded the case for a distinct finding on the question whether the disputed land was part of that leased to the plaintiff in 1870. The second decision of the Lower Appellate Court was more favorable to the plaintiff; in that it decreed to him *khas* possession of 764 bigahs of the disputed land, to the whole of which the decree declared him entitled. The defendant again specially appealed to the High Court.

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GUNGARAM  
DUTT  
v.  
CHOWDHRY  
JUNMAJOY  
MULLICK.  
—  
Judgment.  
—

For Appellant: *Baboo Rashbehary Ghose and Bhowany Churn Dutt* contended:

(1.) That it was not competent for the Court below to vary the decree of the 11th of May 1874, in favor of the plaintiff, who had not appealed from the said decree, particularly as it had not been set aside, except in so far as it affected the defendant.

(2.) That the plaint, being ambiguous in that it did not specify the kind of possession (*khas* or otherwise) which it demanded, should have been construed most strongly against the defendant.

(3.) That, assuming that it was open to the plaintiff to ask in the present suit for a decree declaratory of his right to receive a proportionate rent, the Court of Appeal ought to have refused to make any such decree, because such decree would have the effect of apportioning the rent as against the tenant.

For Respondents: *Baboo Unnoda Persad Banerjea and Kali Mohun Dass.*

The judgment of the High Court<sup>1</sup> was delivered by

JACKSON, J. :—

JACKSON, J.

This case came before a Division Bench of this Court in March 1875, on the special appeal of the same defendant who is now the appellant before us. The result of that hearing was a remand to the Lower Court, directing certain issues to be tried. The Lower Appellate Court has complied with the directions of this Court. In fact there has been a fresh hearing in both the Courts

<sup>1</sup> JACKSON and McDONNELL, J.J.



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 MULLICK.

*Judgment.*

JACKSON, J.

below. The result is, that the plaintiff who was respondent has got a decree more favorable to him than that which he originally obtained, and this constitutes the first ground of special appeal before us to-day. It appears to me obvious that if, on the Court below making a decree which is favorable in some respects to one party and in some to the other, one of these parties being dissatisfied with the result chooses to appeal to this Court and re-open the whole case, he must acquiesce in the result finally arrived at by the Court below in accordance with the instructions of this Court on his special appeal. He is not entitled to say the plaintiff ought not to have that which he did not obtain in the first instance, merely because the plaintiff was willing, if the defendant was so minded, to allow the original decree to stand. He chooses to reopen the question, and he must take the consequences.

Another ground urged is, that the kind of possession which the plaintiff sought for was not stated with sufficient clearness in the plaint, and the special appellant complains particularly of an admission made by the plaintiff's pleader in the Court below that he had purposely left his plaint in that respect uncertain. It seems to me it may very well be that a plaintiff, being doubtful as to the precise form of relief which his facts, as proved, might entitle him to, may ask the Court to give him such relief as under the circumstances the Court may think fit to give. This is exactly what has happened in this instance.

Another ground stated is, that the result of the present suit has been to divide the rent which the defendant originally undertook to pay to a single lessor into two parts, one of which parts has to be paid to Government, and the other to another party. This is an incident which may constantly happen where the interests of the original lessor become divided under circumstances not in the contemplation of the parties when the lease was granted. The defendant, if he is obliged to pay his rent in these two parts instead of one, will have the satisfaction of knowing that the arrangement under which he is compelled to make such payment has received the sanction of a Court of Justice.

The appeal will be dismissed with costs. There will be no separate costs to Government.

## [CIVIL APPELLATE JURISDICTION.]

ANUNGO MOHUN DEB ROY . . . . . DEFENDANT;

AND

MUDDUN MOHUN MOZOOMDAR AND OTHERS PLAINTIFFS.

1877  
December 4.  
—*Suit for Rent—Current Rate of Interest—Act VIII (B.C.) of 1869,  
Section 21.*

Where a pottah stipulates that, in case of default of punctual payment of rent, all arrears shall bear the customary and legal interest, 12 per cent. per annum will be allowed in analogy to Act VIII (B.C.) of 1869, Section 21.

**REGULAR APPEAL** from a decree of the Subordinate Judge of Jessore.

This was a suit by respondents for arrears of rent. It appeared that the defendant was a durputnidar, claiming under a pottah from a former proprietor whose interest passed to the plaintiffs by means of purchases made at sales in execution of decrees passed against the former proprietors. The appellant raised several defences, most of which were formal. The pottah under which he claimed contained a clause providing that, "if there be negligence in making payment of rents, the arrears shall be realized with interest and costs in a summary way, &c., according to custom and law." Plaintiff claimed the rent and interest at 12 per cent. per annum, and this was allowed by the Subordinate Judge. Defendant appealed on the ground that the interest allowed was excessive.

For Appellant: *Baboo Rash Behary Ghose.*

For Respondents: *Baboo Bhubany Churn Dutt and Bungshee Dhur Sen.*

The following judgment of the Court,<sup>1</sup> on the question of interest, was delivered by

MARKBY, J.:—

MARKBY, J.

On the question of interest the law under Act VIII (B.C.) of 1869 declares that arrears of rent are liable to 12 per

<sup>1</sup> MARKBY and MITTER, J.J.

1877  
**ABUNGO**  
**MOHUN DES**  
**ROY**  
**v.**  
**MUDDUN**  
**MOHUN**  
**MOZOONDAR**  
**AND OTHERS.**

cent. interest, unless otherwise provided for by agreement. That amount was, no doubt, fixed with reference to the custom of the country, and therefore the decree of the Lower Court is fully in accordance with the terms of the defendant's pottah, which says that in suits for arrears of rent interest should be fixed according to the custom and law.

—  
*Judgment.*

—  
**MARKET, J.**

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## [CIVIL APPELLATE JURISDICTION.]

SREEMUTTY GOLUCK MONY DEBIA } DECREE-HOLDERS ;  
 AND OTHERS . . . . . }

1877  
 December 6.

AND

MOHESH CHUNDER MOSA . . . . JUDGMENT-DEBTOR.

*Rent Decree for less than 500 rupees—Act VIII (B.C.) of 1869, Section 58—  
 Limitation—Application for Execution—Fresh Application.*

The true construction of Act VIII (B.C.) of 1869, Section 58, is that execution shall not issue unless a proper application for execution is made within three years from the date of the judgment.

*Rhedoy Krishna Ghose vs. Koylash Chunder Bose*, 13 W. R. (F.B.) 3, cited and followed.

*Lalla Ram Sahoo vs. Dodraj Mahto*, 20 W. R., 395, dissented from.  
 Circular Order of the 10th of July 1874, discussed.

**SPECIAL APPEAL** from an order passed by the Judge of Hooghly, affirming that of the Moonsiff of Ampta.

A rent decree was passed against the respondent, in favor of the appellant, on the 31st of January 1873. A general application for execution, both against the person and property of the debtor, was made and granted on the 5th July 1875.

*Statement.*

The question in the case was : Whether the granting of this application would warrant the decree-holder in proceeding by successive steps, at one time against the property, and at another time against the person of the judgment-debtor, without making a fresh application.

For Appellant : *Baboo Bama Churn Bannerjee.*

For Respondent : *Baboo Boido Nath Dutt.*

The judgment of the Court<sup>1</sup> was delivered by

MARKBY, J. :—

MARKBY, J.

In this case we think that the decision of the Moonsiff and of the District Judge was wrong, and that execution ought to

<sup>1</sup> MARKBY and MITTIE, J.J.

1  
1877

SREEMUTTY  
GOLUCK  
MONY  
DEBIA AND  
OTHERS  
v.  
MOHESH  
CHUNDER  
MOSA.

*Judgment.*

MARKBY, J.

have been allowed to issue. The decree was dated the 31st January 1873, and was a decree for arrears of rent. On the 5th July 1875, the decree-holder applied for execution by arrest and by attachment and sale of the property of the judgment-debtor. On the 22nd of September 1875, the decree-holder informed the Court that the judgment-debtor had made a proposal for a compromise, and that it was not necessary that he should be arrested. Subsequently, he applied for attachment of the judgment-debtor's property; and, on the 15th of March 1876, that application was disallowed on the objection of the judgment-debtor, upon the ground that under the Rent Law this property could not be attached until other steps were taken. Immediately upon this, the judgment-debtor made an application for the arrest of the judgment-debtor.

Now the Full Bench have laid down, in a case reported in 13 W. R., 3, F. B.; 4 B. L. R., 82, F. B.—*Rhedoy Krishna Ghose vs. Koylas Chunder Bose* (and that decision is binding upon us)—what the true construction of the section (58, Act VIII (B. C.) of 1869) is, which imposes a term of limitation of three years upon a judgment-creditor when applying for execution. The effect of that decision is stated in the judgment of Mr. Justice Macpherson, who says that “the words should be considered as meaning that execution shall not issue unless a proper application for execution is made within three years from the date of the judgment. That I understand to be the decision of the majority of the Judges of the Full Bench. That being so, the real question which we have to determine in this case is, whether the proceeding of the 17th March 1876 was a new and substantive application for execution, or whether it was merely a step taken by the judgment-creditor in furtherance of the execution for which he applied, and applied successfully, on the 6th July 1875. Now, one of the facts to be noticed in this case is, that the proceeding, which took place on the 17th of March 1876, and subsequent proceedings, were all under the original number which was borne by the proceedings of 1875. I do not say that that was conclusive in the matter; but it certainly goes to show that the proceedings, which followed upon the application of the 17th March 1876, were not proceedings upon a new execution then for the first time issued, but steps taken in furtherance of the

original application. Under all the circumstances of this case, we think that we are justified in saying that the steps taken for the arrest of the judgment-debtor in March 1876 were not new proceedings, but a continuation of the old proceedings. If that be so, then, according to the Full Bench decision, it is incumbent upon us to hold that they are not barred.

The District Judge has relied upon the terms of a Circular Order<sup>1</sup> of this Court. We do not at all wish to weaken the effect of any thing which is stated in that Circular Order. That Circular Order does not, and could not, affect the law as laid down by the Full Bench decision. Notwithstanding anything which is contained in that Circular Order, the question must be decided in the same way, *viz.*, by enquiring whether the application for execution, upon which proceedings were had, was made within three years from the date of the decree.

The vakeel for the respondent has also relied upon a decision in 20 W. R., 395—*Lalla Ram Sahoo vs. Dodraj Mahto*. All that is necessary for us to say upon that decision is this, that the question of delay on the part of the judgment-creditor is nowhere referred to by the Full Bench. It may be that the question of delay on the part of the judgment-creditor may, in some cases, be useful in assisting the Court to determine whether an ambiguous proceeding is a fresh application for execution, or a step taken in furtherance of a previous application. But there is nothing which will authorize us to import into the law of limitation, the question of diligence on the part of the judgment-creditor as a substantive portion of that law.

We think that the decision of the District Judge must be set aside, and the money deposited by the judgment-debtor must be paid out to the decree-holder. The decree-holder will be entitled to his costs in this Court and in the Courts below.

<sup>1</sup> NOTE.—In this Circular the Court intimated that in such cases "the same process of execution cannot be executed more than once, and directed that the reception of supplementary lists of property to be attached, or other devices by which the provisions of Section 58, Act VIII. (B. C.) of 1869, are evaded, may be at once put a stop to"—13 B. L. R., 62, High Court Rules, &c.

1877  
SREEMUTTY  
GOLUCK  
MONY  
DEBIA AND  
OTHERS  
v.  
MOHESH  
CHUNDER  
MOHA.  
Judgment.  
MARKBY, J.

## [CIVIL APPELLATE JURISDICTION.]

1877  
December 6.

HURRI MOHUN BAGCHI AND ANOTHER. . PLAINTIFFS;  
AND  
GRISH CHUNDER BUNDOPADHYA AND } DEFENDANTS.  
ANOTHER . . . . . }

*Mortgage Bond—Sale under money-decree—Lien—Act VIII of 1859,  
Section 12—Property in different Districts.*

A mere money-decree upon a mortgage bond gives the judgment-creditor the power of selling the mortgaged property with the lien, in the same way as a decree with express power to sell the mortgaged property.

A person who advances money to another for the purpose of saving a mehal of the latter from sale for arrears of rent has no lien on the property for the money advanced.

*Baboo Dutt Jha vs. Pearee Kaunt*, 18 W. R., 404; and *Synd Enayet Hossein vs. Muddun Moores Shahoo*, 22 W. R., 411, cited and held not to apply.

**R**EGULAR APPEAL from a decree passed by the Subordinate Judge of Moorshedabad.

This was a suit for a declaration of a mortgage lien and for attachment and sale.

The facts may be stated as follows : On the 20th of June 1868, Grish Chunder Bundopadhyya mortgaged the property in dispute to Muddun Mohun Pal. On the 28th of February 1873, Grish Chunder borrowed Rs. 3,000 from Hurri Mohun Bagchi and Sreenarain Bagchi for the purpose of saving the same property from sale for arrears of rent ; and the money was applied for that purpose. On the 27th of June 1873, Grish Chunder borrowed another Rs. 3,000, and by a bond hypothecated the property in dispute to secure the payment of the whole Rs. 6,000. This bond cited the previous hypothecation to Muddun Mohun. The property in dispute was situate partly in the district of Nuddea, and partly in Moorshedabad. On the 5th of March 1874, Muddun Mohun, having previously obtained a mortgage decree against Grish Chunder Bundopadhyya, sold the property to

Kali Prosonno Pal Chowdry. It does not appear that he applied for leave to proceed with his suit in the Nuddea Court, under Section 12, Act VIII of 1859.

The Lower Court held that the mortgage decree obtained by Muddun Mohun on the 5th of March 1873 had the effect only of a mere money-decree, as no leave was given to proceed under Section 12, Act VIII of 1859 ; but that the sale of the property under this decree to Kali Prosonno Pal Chowdry on the 5th of March 1874, carried the property, and with it the lien of the first mortgagee, Muddun Mohun ; but that, because Rs. 3,000 of the plaintiff's claim was lent to save, and did save, the property from sale, the plaintiff had a prior right to be paid that amount, and gave his decree accordingly.

Both parties appealed.

*Baboo Mohiny Mohun Roy* and *Rashbehary Ghose* (for Kali Prosonno Pal Chowdry) contended that the plaintiffs were not entitled to any priority in respect of the Rs. 3,000 advanced to protect the property.

For Respondents : *Baboo Gooroo Dass Banerjee*.

[It is unnecessary to refer to the plaintiff's appeal, which was dismissed, the Court following Syud Enam Montezudeen Mahomed vs. Rajcoomar Dass, 23 W. R., 187 ; 14 B. L. R., 408.]

The following judgment of the High Court<sup>1</sup> in the other appeal was delivered by

MARKBY, J. :—

MARKBY, J.

In this case, which raises the question as to the three thousand rupees, there we think the Subordinate Judge was wrong. It appears that there being a prior mortgage, and the property being about to be sold for arrears of rent, the plaintiffs advanced to the son of the mortgagor, under an ordinary bond without security, the sum of three thousand rupees upon interest at the rate of upwards of seventy per cent. per mensem. There seems no doubt, at any rate we may assume upon the evidence, that that money was actually applied to the payment of the rent which was then due in respect of the mortgaged property, and that the

<sup>1</sup> MARKBY and MITTER, J.J.

1877  
HURRI MO-  
HUN BAGCHI  
AND ANOTHER  
v.  
GRISH CHUN-  
DER BUNDO-  
PADHYA AND  
ANOTHER.  
—  
Judgment.  
—



1877  
 HURRI MO-  
 HUN BAGCHI  
 AND ANOTHER  
 v.  
 GRISH CHUN-  
 DER BUNDO-  
 PADHYA AND  
 ANOTHER.

*Judgment.*

MARKBY, J.

sale of that property was thereby prevented. That, no doubt, was the intention of the parties to the loan. The Subordinate Judge says upon that: "The tenure being under the law hypothecated for its arrears, one who saved the tenure from being sold at a sale for its own arrears by advancing money, and thereby preserves another person's mortgaged right from being extinguished, places himself in the position of a first mortgagee and all other lien-holders under him;" and he refers in illustration of that to the observations of Mr. Justice Mitter in 18 W. R., 404—*Baboo Dutt Jha vs. Pearee Kaunt*. There is no authority for any such general proposition of law as is here laid down by the Subordinate Judge. The case which he refers to has no bearing whatever upon the question. The marginal note is not correct. There, all that Mr. Justice DWARKANATH MITTER says is, that, if the vendor of the plaintiff in that case, or the plaintiff himself, was entitled on equitable grounds to be considered as the assignee of the first mortgagee, then his remedy would be one of a particular kind. Whether the plaintiff had those rights or had not, it was not necessary to consider in that case. The suit was dismissed upon another ground. Then the respondents have also relied upon a decision of Mr. Justice ROMESH CHUNDER MITTER and myself in 22 W. R., 411—*Syud Enayet Hossein vs. Muddun Mooree Shahoo*. That case depends upon a totally different principle. There the person, who came forward and paid the money in respect of which he afterwards claimed a lien upon the property, was a co-sharer, and he advanced the money in order to pay the Government revenue which was due upon the property. That case is distinguishable from this, upon the ground that that was a case in which the plaintiff, being one of the several persons whose duty it was to discharge the burden, came forward and discharged the whole of that burden. No authority has been shown to us for extending that principle to a case where a person, having no interest in the matter, comes forward to discharge a burden upon property, and we cannot so extend it. The decision in that respect must be reversed, and this appeal allowed with costs.

The result will be, that the whole suit will be dismissed with costs of this Court and of the Court below.

## [CIVIL APPELLATE JURISDICTION.]

RAKHALDAS BUNDOPADHYA . . . . DEFENDANT ;

AND

INDRU MONEE DEBI . . . . . PLAINTIFF.

1877  
December 6.*Adverse possession—Co-sharer—Limitation—Secondary Evidence.*

When one co-sharer sets up as against another adverse possession of land which had previously been waste, but at some former time had been occupied and then been admittedly held jointly, it is for him to show that he has held possession in such a way as to give distinct notice to his other co-sharers of his intention to set up a title adverse to them.

Secondary evidence of a document should not be admitted unless the absence of the original is sufficiently accounted for.

**SPECIAL APPEAL** from a decree of the Subordinate Judge of Nuddea, setting aside that of the Moonsiff of that District.

This was a suit for possession of a share instituted by the respondent. It appeared that the disputed property had been held by both parties jointly ; but that for many years previous to suit the land had lain waste. The plaintiff alleged that he had been dispossessed by the defendant in Bysack 1276 and Bysack 1278. Defendant denied this, and claimed that the property had always been his exclusively ; he also pleaded limitation. Part of the plaintiff's case was, that the land in dispute was granted to the common ancestor of the parties in patni ; plaintiff was unable to produce the patni pottah in evidence, but the Subordinate Judge allowed oral evidence of its contents.

For Appellant : *Baboo Bhoyrub Chunder Banerjea and Guru Das Banerjea.*

For Respondent : *Baboo Bungshee Dhur Sen.*

AINSLIE, J. :—

AINSLIE, J.

With reference to the question of limitation I think that the Subordinate Judge is right.

For the purpose of determining that question it must be assumed that the allegations of title were true. The Subordinate

1877  
 BAKHALDAS  
 BUNDO-  
 PADHYA  
 v.  
 INDREU  
 MONER DEBI.  
 Judgment.  
 AINSLIE, J.

Judge has found that the plaintiff and defendant were jointly in possession, and jointly realized rents from the tenants who squatted on the land before it became waste more than twelve years ago. So long as any profit was derivable from the land, they jointly had the benefit of it. When the land became waste, their joint ownership and possession were not in any way interfered with. It must be taken that their possession continued as before until something was done to alter the position of the parties in respect of each other. When one co-sharer sets up as against another adverse possession of land which had previously been waste, but at a former time had been occupied and had then been admittedly held jointly, it is for him to show that he has held possession in such a way as to give distinct notice to his other co-sharers of his intention to set up a title adverse to them.

Now, even supposing the possession of the defendant to have been in its nature adverse, the Subordinate Judge has found on the evidence that it did not run far enough back to interfere with the right of the plaintiff to recover, so that he (plaintiff) must be presumed to have carried on the original possession during the time that the land lay wholly waste and unoccupied up to a period within twelve years of the institution of the suit.

The second ground of appeal, however, seems to be one to which effect must be given. It is that, whereas the plaintiff relies upon a title founded on a patni, created by an instrument in writing, it was not open to him to ask the Court to receive any evidence of the nature of the grant, except the writing itself, until the absence of that writing had been sufficiently accounted for.

The plaintiff has clearly not sufficiently accounted for the absence of the patni lease. He stated that he believed it to be in the hands of one of the defendants, and caused that person to be summoned to produce it. The defendant did not produce it and stated that it was not with him. It does not appear on the record that the plaintiff took any sufficient steps to cause the document to be brought into Court if still in existence, nor is there any thing from which the Court might reasonably infer that the document is no longer in existence and incapable of

being produced. Under these circumstances, the question whether the plaintiff held under a patni lease or not cannot be determined on the oral evidence. It has been said that oral evidence of possession is sufficient to enable the plaintiff to recover, if the Court will infer from it the existence of his patni title. No doubt in some cases possession is taken to be evidence of an underlying but uncertain title; but in such cases possession must have run on up to the time of the alleged ouster from which the suit takes its origin. In this case active visible possession terminated many years ago, though within twelve years of the institution of the suit. For the purpose of the first issue—the issue of limitation on the assumption of the existence of a patni title—possession may be taken to have been continuing, throughout the time when the land lay waste, in those who actually enjoyed it when the land was formerly occupied; but, when we come to the question of title, there is no presumption at all that a title continues, or that the actual exercise of the rights conferred by it ceases otherwise than by forcible interruption. Unless the patni can be established, there is nothing to show that the possession of the plaintiff was founded on such a title as would give rise to the presumption on which the finding on the issue of limitation is based. He may have been holding under a title which terminated at the same time as the active enjoyment of the property came to an end.

Therefore, on the second ground, I think that the order of the Subordinate Judge must be reversed, and the judgment of the First Court affirmed. The appeal is allowed with costs.

1877

RAKHALDAS  
BUNDO-  
PADHYA  
v.  
INDRU  
MONER DEBI.

—  
*Judgment.*

—  
AINSLIE, J.

## [CIVIL APPELLATE JURISDICTION.]

1877  
December 7.

MAHARAJAH OF BURDWAN . . . JUDGMENT-DEBTOR ;

AND

RAM LALL MOOKERJEE . . . . DECREE-HOLDER.

*Interest on Costs.*

It may be taken as established that the Court will not allow interest on costs in cases where the decree is silent about it.

*Ameeromissa Khatoon vs. Meer Mahomed Chowdry*, 18 W. R., 103;  
*Ulfutunnissa vs. Mohan Lall Sukal*, 6 B. L. R., 33 App; and *Mosoodan Lall vs. Bheekaree Singh*, 6 W. R., 109, Mis., cited and followed.

**R**EGULAR APPEAL from an order passed by the Subordinate Judge of Hooghly.

For Appellant: *Baboo Jugadanund Mookerjee, Chunder Madhub Ghose, and Bussunt Coomar Bose.*

For Respondent: *Baboo Sham Lall Mitter.*

The facts of the case are sufficiently set forth in the judgment of the High Court,<sup>1</sup> which is as follows :—

*Judgment.* In this case two objections have been raised before us in appeal. First, that the judgment of the Lower Court is wrong in allowing interest upon costs when the decree does not expressly award it; secondly, that the Lower Court was not right in awarding interest upon the principal sum decreed after the 18th September 1876, when the judgment-debtor deposited the money due from him in the Collector's office; and that, at any rate, the Lower Court should not have awarded interest after the date when the Collector of Burdwan, by a roobocary, informed the Court that he had no objection to pay the money deposited to the decree-holder.

As regards the first question : Although it seems that the practice of the Court was not uniform for some time upon this matter, yet the later decisions establish that this Court has refused to

<sup>1</sup> MARKBY and MITTER, J.J.

allow interest upon costs in cases where the decree is silent about it. Of these latter cases, one reported in 6 B. L. R., 3 App.,—*Ulfutunnissa vs. Mohan Lall Sukal*, and another in 18 W. R., 103,—*Ameeroonissa Khatoon vs. Meer Mahomed Chowdry*, are clearly in point. We think that these decisions are in accordance with the principle laid down in the Full Bench decision reported in 6 W. R., 109, *Mis.—Mosoodun Lall vs. Bheekaree Singh*. Following those decisions we, therefore, think that the judgment of the Lower Court upon this point is not right. The judgment-creditor is not entitled to interest upon the costs awarded in the decree.

With reference to the other objection, it was stated by the pleader for the appellant that his client deposited in the Collectorate the money that was due from him, some time in September 1876; and that, in the following December, the Collector of Burdwan, in answer to a roobocary of the Court in which the decree was being executed, signified his consent to pay over the money to the decree-holder. The learned pleader, upon these facts, argued that, after this roobocary was sent by the Collector, there was nothing to prevent the decree-holder from taking out this money from the Collectorate; and he further contended that it was only on account of the laches of the decree-holder that the money was not paid over until February 1877. Upon these facts, he contended that the Lower Court was not correct in allowing interest after the money was deposited by the judgment-debtor in the Collectorate. At any rate, he contended that the Lower Court was not justified in allowing any interest after the date of the Collector's roobocary. No doubt, if the facts were as was stated to us by the pleader for the appellant, this contention would have considerable force; and, no doubt, we should have given effect to it by altering the judgment of the Lower Court. But the Lower Court on this point finds that "there was no intentional delay, on the part of the decree-holder, to apply to obtain a cheque for the money;" and on this ground, the Subordinate Judge overruled the objection. Referring to the record, we find that this finding is fully supported. It appears that, after the roobocary of the Collector in December, there was a further correspondence between the Civil Court, in which the decree was being executed, and the Collector upon the matter; and there was also some delay necessarily

1877  
 MAHARAJAH  
 OF BURDWAN  
 v.  
 RAM LALL  
 MOOKERJEE.  
 —  
*Judgment.*

1877  
MAHARAJAH  
OF BURDWAN  
v.  
RAM LALL  
MOOKERJEE.

—  
*Judgment.*

occasioned in getting the power-of-attorney executed, in favor of the persons who were appointed by the decree-holder to draw out this money; and then it was finally ordered by the Civil Court that the money should be paid over to certain persons mentioned in the order of the Court, who were appointed by the decree-holder to draw out this money from the Collectorate. The facts being clear from the record, it appears to us that the judgment of the Subordinate Judge upon this point is correct. We think, therefore, that the decision of the Lower Court should be varied only upon the matter of interest upon costs.

Under the circumstances of this case we think that there should be no costs of this appeal.

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## [CRIMINAL APPELLATE JURISDICTION.]

## [FULL BENCH.]

BURA HANGSEH AND BOOK SINGH . . APPELLANTS;

AND

THE QUEEN . . . . . RESPONDENT.

*Legislative Councils, Powers of—absolute and limited—Delegation—**Act XXII of 1869.*

1877

February  
2, 5, and 7.  
March 26.

Statement.

*Held, per CURIAM:*—The High Court is competent and bound to determine whether the Legislature, in passing an Act, has acted within its legitimate powers.

The Governor-General in Council could, in the exercise of his legislative powers, have removed the district of the Cossyah and Jynteeah Hills from the jurisdiction of the High Court.

*Per JACKSON, AINSLIE, MARKEBY, and KEMP, J.J. (GARTH, C.J., MACPHERSON and PONTIFEX, J.J., dissenting):*—The notification of the Lieutenant-Governor, issued under authority of Act XXII of 1869, Section 9, could not have the effect of putting an end to the jurisdiction of the High Court in the Cossyah and Jynteeah Hills; that jurisdiction is now the same as it was before the notification was issued by the Lieutenant-Governor.

*Per GARTH, C.J., MACPHERSON and PONTIFEX, J.J., contra:*—Act XXII of 1869 was a law which the Legislature were justified in passing, and which did, in conjunction with the notification which was made under it, effectually remove the district of the Cossyah and Jynteeah Hills from the jurisdiction of the High Court.

*Per GARTH, C.J.:*—The view which the Judges took of the powers of the Indian Legislature in the case of *Biddle vs. Tarriny Ohurn Banerjee* (Taylor and Bell, 391, 477) has been since virtually disregarded by the Legislature itself, and overruled by the Imperial Parliament by the construction which they have put upon the Act of 1833.

*The Queen vs. Meares*, 22 W. R., 54; 14 B. L. R., 106; and in the matter of *Feda Hossein*, I. L. R., 1, Cal., 431, referred to.

CRIMINAL APPEAL from an order passed by the Deputy Commissioner of Shillong convicting the appellants, and sentencing them to death on a charge of murder.

In this case the appellants were indicted before the Deputy Commissioner of Shillong for the wilful murder of one Kana Lalong. The charge is as follows: "That you, Book Sing and Bura Hangseh, on or about the 13th of November 1875, near Yeo Thymai, in the jurisdiction of the Jynteeah Hills, intentionally caused the



1877  
 BURA  
 HANGSEH AND  
 BOOK SINGH  
 v.  
 THE QUEEN.  
 Argument.

death of one Kana Lalong, and thereby committed an offence punishable under Section 302 of the Indian Penal Code, and within the cognisance of this Court under Chapter III, Rule 17, of the Cossyah Hill Code." The prisoners were found guilty and sentenced to death by the Deputy Commissioner, on the 20th of April 1876: this sentence was commuted to transportation for life by the Chief Commissioner, on the 23rd of April 1876.

The prisoners appealed to the High Court on the 9th of July 1876, and the question then arose whether an appeal lay. The case was argued before a Division Bench by the Legal Remembrancer (Mr. Bell) on behalf of the Government of Bengal, and was referred to a Full Bench, where it was again argued, at the instance of the Government of India, on the 30th of January, 2nd, 5th, and 7th of February 1877.

The main question was: Whether a notification of the Lieutenant-Governor of Bengal, issued under the authority of Act XXII of 1869, Section 9, had the effect of putting an end to the jurisdiction of the High Court in the Cossyah and Jynteeah Hills?

The historical position of this district is shown in the judgment of Mr. Justice MARKBY.

*Paul*, (Advocate-General,) and *Kennedy*, (Standing Counsel) for the Government.

This Court has no jurisdiction to entertain the appeal. The 9th Section of the High Court's Act, 24 and 25 Vic., c. 104, gives to the Governor-General of India in Council the power of abolishing the jurisdiction of the High Court in any district whatever, and this is what has been done by Section 3, Act XXII of 1869 which repeals Act VI of 1835. It was that Act, and that Act alone, which gave jurisdiction over the Cossyah Hills to the Nizam Adawlut. To this jurisdiction the High Court succeeded; and the repeal of the Act which gave it has taken it away, and restored the state of things which previously existed.

Even if it be considered that Section 3, Act XXII of 1869, has not taken away the jurisdiction of the High Court, the Act, as a whole, clearly does so. It evinces the final determination of the Legislature to abolish the jurisdiction, merely leaving to the Lieutenant-Governor the power of naming the day on which

should take place. Such a power is purely ministerial and not legislative.

Though it be held that the powers given to the Lieutenant-Governor, by the 9th Section of Act XXII of 1869, are legislative and not ministerial, that does not make the Act invalid, for the Governor-General of India in Council may delegate certain powers which in effect might be deemed legislative to any functionary and to any extent he may think fit. It must be remembered that the Indian Legislature is not a limited one. It is as absolute as the Imperial Parliament, whose full powers it has received, subject to certain restrictions, which are specifically mentioned in Section 22 of the Indian Councils' Act, 24 and 25 Vic., c. 67. There are no legal limits to the power of the Indian Legislature, but merely political ones with which this Court has nothing to do. If, however, it be held that this Court may examine the Acts of the Legislature, its power of doing so is limited to Acts which trench on the forbidden subjects, or are connected with the enacting machinery contained in the statute, and cannot extend to criticising the mode in which the Legislature thinks fit to carry out its intention. It is clear that the Legislature could do away with the jurisdiction of this Court; that it could declare that at the end of a certain time, or on the happening of a contingency, the jurisdiction of this Court over a certain district should be abolished. What more has it done here? If it be held that the Governor-General in Council cannot affect the jurisdiction of this Court, except by the direct Act of the Council assembled for the purpose of making laws and regulations, and cannot do it through authority given by that Council to the Lieutenant-Governor or any other functionary, then this Court will not be deciding but legislating, will be imposing a restriction on the legislative powers of the Governor-General in Council which the Imperial Parliament did not see fit to do.

Again, in Act XXII of 1869, the Legislature did not attempt to exercise any power which had not been previously exercised over and over, nor one which had not been sanctioned by the Imperial Parliament. In a long series of Acts, from 1835 to 1861, powers strictly analogous to those now contended for were exercised under 3 and 4 Will. IV, c. 85; and the Imperial Parliament, who must be presumed

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to know the construction put on this Act, as the two are *in pari materia*, so far from restraining, actually increased the legislative powers of the Governor-General in Council by 24 and 25 Vic, c. 67. If contemporary opinion and a long course of legislation are sufficient, as they undoubtedly are, to show the validity of the course pursued, then it is clear that this Court has no jurisdiction, and that the appeal cannot be maintained.

The following Acts and authorities were cited:—Acts II and VI of 1835; XXIX of 1837; VI and XVIII of 1844; VII and XXI of 1845; IX of 1846; XVI of 1847; XI of 1848; XXXV of 1850; I of 1852; XVIII of 1853; XVII of 1854; XXII and XXXVII of 1855; XIII and XX of 1856; XXIX and XXXVI of 1857; XXIX of 1858; VIII, XIII, XIV, XXII, and XXIV of 1859; IX and XXII of 1860; V, XIV, XXIII, and XXV of 1861; VI, XIV, and XIX of 1863; XXII of 1864; XIV of 1865; XXIII of 1867; *Leverson vs. The Queen*, Law Rep., 4 Q. B., 394; *Bocking vs. Jones*, Law Rep., C. P., 29; *Doyle and others vs. Falconer*, Law Rep., 1 P. C., 328; *Rossiter vs. Trafalgar Life Assurance Association*, 27 Beav., 377; *Quebec and Richmond Railway Company vs. The Queen*, 12 Moore's P. C., 232; Kent's Commentaries; Sedgwick on Constitutional Law; Maxwell on Statutes.

*Phillips*, for the Appellants.

The jurisdiction of the High Court cannot be taken away by any authority in this country, unless specially empowered to do so by the Imperial Parliament, and no such power has been given. It cannot be held that Section 9 of the High Courts' Act, 24 and 25 Vic, c. 104, supports the contention of the other side without straining the language of that section. Supposing, for the sake of argument, that it does, then the power conferred by it must be exercised by the Governor-General in Council, and cannot be delegated to the Lieutenant-Governor or any other public functionary; for the Indian Legislature is a body to which powers legislative have been delegated, and, therefore, the rule *delegatus non potest delegare* clearly applies—*Biddle vs. Tarriny Churn Banerjee*, Taylor and Bell, 391, 477.

Had it been intended to confer on the Indian Legislature an

absolute authority subject only to certain restrictions, as is erroneously contended by the Government in this case, the Imperial Parliament would have so expressed itself. (See the Act for the union of Canada, New Brunswick, and Nova Scotia, and for the Government thereof, 30 Vic., c. 3, s. 18.) The fact that Section 25 of the Councils' Act was passed to validate the rules made for the Non-Regulation Provinces, and the similar provisions inserted in 33 and 34 Vic., c. 34, are fatal to that contention.

The Acts cited by the other side do not apply, as the powers therein delegated are purely ministerial. Here it is wholly left to the Lieutenant-Governor to determine whether the existing legislation shall be swept away. If the Governor-General in Council can confer such a power, then there is nothing to prevent his giving to any person the power of doing away with the whole existing legislation in Lower Bengal; nothing, in fact, to prevent the whole legislative powers being transferred to a single individual.

*Kennedy*, in reply :

The general authority given to the Governor-General in Council to make laws is amply sufficient to carry with it the powers here contended for. There is a wide distinction between the grant of a general power and the grant of a particular power, for example, to execute a deed. In the latter case, if the grantee of the power transfers that power to some one else, he does what he was not authorised to do: he was not authorised to transfer, but merely to execute. Where, however, the Imperial Parliament has conferred a general power on the Indian Legislature to make laws, these laws may be made by it in any manner it thinks fit, and the only question can be; Is the disputed Act a law? Now, Act XXII of 1869 is clearly a law. It is, therefore, valid unless prohibited by Section 22 of the Councils' Act, which it is not.

It is not necessary for me to go so far as to contend that the Indian Legislature has power to pass an Act abdicating its functions; that it clearly could not do for an obvious reason. It was called into existence by the Imperial Parliament for a permanent object, and it is only the power which called it into existence can do away with it.

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The important questions which we have to decide in this case have now been maturely and anxiously considered by this Court ; and although I regret for some reasons the decision at which the majority of the Court have arrived, it is satisfactory to know that the points have been argued as fully as they could have been ; and that our attention has been called, as I believe it has, to all the available materials, which could guide our minds to a just conclusion.

The case has been twice argued :—first, by the Legal Remembrancer on behalf of the Government of Bengal ; and again, at the instance of the Government of India, by the Advocate-General and the Standing Counsel, Mr. Kennedy, for the Crown, and by Mr. Phillips on behalf of the prisoners, whose services the Government have very properly retained for that purpose.

Upon the first point which we have to determine, there is little or no difference of opinion. We are all agreed that the Governor-General in Council could, in the exercise of their legislative powers, have removed the district of the Cossyah and Jynteeah Hills from the jurisdiction of the High Court.

The only question is : Whether by the means which they have adopted they have effectually carried out that object ?

The jurisdiction of the Court has certainly not in this instance been taken away by any *direct action* of the legislative body. Act XXII of 1869 did not of itself even profess to take away that jurisdiction.

It can only be said to have done so *indirectly*, by conferring upon the Lieutenant-Governor of Bengal what was undoubtedly a very large discretionary power.

He was by that Act invested with authority to remove the district in question from the jurisdiction of the High Court, and to abolish entirely at his own discretion, and at his own time, the laws and the system of judicature which prevailed there.

He had also the power of introducing new laws, and of re-constituting a judicial system in accordance with his own views ; or he might, if he had so pleased, have left the district entirely destitute of any laws, or any judicial system whatever.

<sup>1</sup> GARTH, C.J., KEMP, JACKSON, MACPHERSON, MARKBY, AINSLIE, and PONTIFEX, J.J.

It may indeed be open to grave doubt, whether, looking only to the Statutes from which the Legislature of India derive their powers, it was contemplated by Parliament that they should exercise those powers, by conferring on any other person or body of persons, so large a discretion.

But the question which we have to decide is, not whether in this instance the Legislature have exercised their powers wisely, or in such a way as Parliament intended that they should exercise them; but—

1st.—Whether they had the power to take away the jurisdiction of the Court by the means which they adopted; and

2ndly.—Whether that is a question, which the Courts of this country have a right to determine.

It will be convenient to deal first with the last of these points.

It was argued at the Bar that the power of making laws and regulations which was given to the Legislature of this country by the Councils' Act, was as extensive a power (subject to the restrictions contained in Section 22) as was possessed by the Imperial Legislature; and that any enactment which they were pleased to pass under the name of a law, could be no more questioned by the Courts than an Act of Parliament.

But it seems to me that a great and dangerous fallacy underlies this argument, because there may be many enactments, which the Indian Legislature may pass, and honestly believe that they have a right to pass, but which may nevertheless be *ultra vires*, and of no force at all as laws. Suppose, for example, that an Act was passed, which in point of fact infringed one of the restrictions in Section 22, but which the Legislature *bona fide* believed was no infringement, would the belief of the Legislature that they were justified in passing such an Act, prohibit Courts of Justice from inquiring into the validity of it?

Or to take another instance, unconnected with the restrictions in Section 22. Suppose the Legislature were to pass an Act by which they authorized certain Police officers to arrest a French subject in Chandernagore; and upon the man being arrested in Chandernagore, and brought in custody to Calcutta, he were to institute a suit here for illegal imprisonment, would the Courts here have no jurisdiction to enquire into the legality of the

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imprisonment; and would the prisoner be utterly without remedy, simply because the Government had passed the Act, and believed that they had a right to pass it as a law?

These instances are, of course, very clear; but in others considerable doubt might arise, as to whether an Act passed by the Legislature was or was not within their powers; and in all such cases, unless Courts of Law had jurisdiction to determine this question, the Indian public would have no means of redress, and the Government here would be virtually autocratic.

It may be said, no doubt, that the right which Her Majesty in Council possesses of putting a veto on any Act which is passed by the Legislature, affords *some* security against any excess of their powers; but it must be borne in mind, that the scrutiny to which Indian measures are subjected by Her Majesty in Council, is not so much a *legal scrutiny*, for the purpose of ascertaining whether the Act is, or is not, strictly within the powers of the Legislature; but a scrutiny of policy and prudence, to determine whether the Act is in accordance with the views of the Home Government, and a wise and prudent measure, having regard to the interests of the Empire.

I am, therefore, of opinion, that it is the province and duty of this Court to determine whether by the Act of 1869, and the notification in the *Gazette* which was made in accordance with its provisions, the jurisdiction of this Court has been abolished; and that it is not because that Act has been passed by the Legislature *as a law*, that we are disabled from enquiring into its validity.

No doubt, as soon as the fact is once established, that an Act of the Legislature, which has been duly passed, is within the scope of their powers, the Courts have no right to enquire into the propriety or wisdom of the law which is established by that Act; but it is not every Act which the Legislature may pass which can legally be considered as a law.

Thus, to bring the argument nearer home to our present purpose, suppose the Legislature were to pass an Act, transferring the whole of their legislative powers over the Indian Empire to the Governor-General; that, in my opinion, would not be a law at all within the meaning of the Statute. It would simply be

an abdication of their legislative powers in favor of the Governor-General, directly at variance with the language and plain meaning of the Councils' Act; and I should say the same of a similar transfer of their powers with regard to any portion of the Indian Empire.

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Now I consider that the question in the present case is, whether that portion of the Act of 1869 which relates to the Cossyah Hills is a law properly so called, or a mere transfer of the powers of the Legislature to the Lieutenant-Governor of Bengal?

I quite agree with my learned brothers that this is a question of construction; and one to be determined, not only by reference to the Councils' Act itself, but to other Acts of the Imperial Legislature which may be found to have a bearing upon the subject, and to other important considerations, to which I shall presently refer.

If the Act of 1869 stood alone as the only instance of its class, and we had only to determine whether the transfer of power to the Lieutenant-Governor, which is thereby made, was such a law as the Councils' Act authorised, I confess I should feel more doubt upon the question.

But having regard to the course and character of the legislation which has been going on this country, and in England with reference to this country, for the last forty years, it appears to me that the Imperial Legislature have themselves put a construction upon the Councils' Acts, which (so long as it is not inconsistent with the language of the Act itself,) we are bound in duty to adopt, however much it may be opposed to our first impressions; and I quite think also, that every reasonable intention which can legally be made by this Court in favor of the validity of the Acts of the Legislature should undoubtedly be made.

Now, upon looking back through the Acts of Council since the year 1833 when the East India Company's Charter Act was passed, it seems to me impossible to resist the conclusion that the principle and the course of action, which has constantly been pursued by the Legislature of this country, is precisely that which is now called in question in the Act of 1869.

By the Act of 1833 the legislative powers which were then



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conferred upon the Governor-General in Council, were in the same language and (for the purposes of the present case,) to the same effect as those given by the Councils' Act in 1861; and from the time when that Act passed, the Governor-General in Council has constantly been in the habit of exercising those powers through the instrumentality of high officials and public bodies, in whom a large discretion has been vested for that purpose; and when we consider the extent and variety of the business of the Legislature, it is difficult to see how, without such machinery, they could effectually discharge their functions.

It would seem almost impossible in a country like British India, so vast in extent, so various in its population, its laws, and its customs, that the Legislature could perform its multifarious duties satisfactorily, without entrusting to the Executive Government, to the Governors of provinces, or to other high officials and representative bodies, a considerable share in the working out of their manifold and comprehensive measures; and it would also seem impossible that they should do this effectually without vesting in those high personages and bodies a large amount of discretionary power.

Moreover, it must be borne in mind, that whatever important trusts are thus created by the Legislature, they are by no means absolute or irrevocable. Her Majesty in Council can put a veto upon any Act of the Governor-General in Council which her advisers may not approve; and the Government here are always in a position to see how the powers which they have conferred are being exercised; and if they are exercised injudiciously or otherwise than in accordance with their intentions; or if, having been exercised, the result is in any degree inconvenient, they can always by another Act recall their powers or rectify the inconvenience. Now, it will be sufficient for my present purpose that I should refer to a few only of the Acts of Council which were passed by the Legislature between 1833, the year of the East Indian Charter, and the passing of the Councils' Act in the year 1861; and I would refer, in the first place, to the Procedure Code of 1859 and 1861, as being remarkable instances of the course of action to which I have alluded.

The Civil Procedure Code of 1859, which effected a great

change in the law, was only applied in the first instance to the Regulation Provinces of Bengal, Madras and Bombay; and, under the provisions of Section 385, it was not to take effect in any other parts of India until it should be extended thereto by the Governor-General in Council, or by the Local Government of any Non-Regulation territory. Thus the Lieutenant-Governors of Non-Regulation Provinces were empowered at their own discretion, and at their own time, to extend, each to his own territory, the provisions of a Statute, which not only introduced an entirely new procedure into the Civil Courts, but contained enactments, which affected very materially the rights, liberties and property of the subject; and by Act XXIII of 1861, (which was passed in the same year as the Councils' Act,) the Local Governments of Non-Regulation Provinces were invested with a much larger discretion; because they were by that Act authorised to introduce the same Code into their respective provinces, subject to such *restrictions, limitations and provisos* as they might think proper.

Then again, by Act XXV of 1861, the Criminal Procedure Code, a similar power was given to certain Local Governments of introducing at their own option the provisions of that Code into their respective territories; and this Act not only introduced new modes of procedure, but contained many enactments which made a very material change in the Criminal Law.

It seems to me impossible to deny that these Acts did in fact confer upon the Local Governments of Non-Regulation Provinces precisely the same kind of power, although different in degree, as by the Act of 1869 was vested in the Lieutenant-Governor of Bengal; they placed entirely in the hands of the Local Government of those provinces the right of abolishing at their pleasure the old system of procedure, and of introducing a new system which very materially changed the law, and affected the rights and liberties of the inhabitants of those Provinces.

And the Civil Procedure Code of 1861 went further, because it gave the Local Governments a power to alter or modify the Code in any way they might think proper, and so to introduce a different law into their respective Provinces, from that which was in force in the Regulation Provinces.

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And there were many other Acts passed during the period which I have defined, in which the Legislature proceeded upon the same principle, although the powers conferred by those Acts might not have been so extensive as in the two instances which I have just named.

Thus, Act II of 1835 gave the Bengal Government full power to issue any instructions which it might think proper for the control and guidance of the Courts of Assam and Arracan.

Act VI of 1835 contained similar provisions with regard to the Courts in the Cossyah Hills.

Act XXI of 1845 authorized the Governor-General in his executive capacity to place any of certain specified territories under a totally different system of law from that to which they were then subject.

Act IX of 1846 empowered the Madras Government to make laws for the regulation of the Madras harbour.

Act XVI of 1847 conferred upon certain Commissioners the right of making Bye-laws for the Town of Calcutta.

Act XI of 1848 gave the same Commissioners still larger powers of a similar kind.

Act I of 1852 empowered the Bombay Government to make laws for the regulation of the Bombay harbour.

Act XXII of 1860 affords a more striking illustration of the same principle. By that Act the Chittagong Hill Tracts were entirely excluded from the jurisdiction of the ordinary Courts, both civil and criminal, and from the control of the Revenue laws and officers; and they were placed entirely in the hands of the Lieutenant-Governor of Bengal, who was to appoint what Courts and Officers he thought proper, and give what instructions he pleased for the governance of such Courts and officers.

And again, Act XIV of 1861 contained similar provisions with regard to the Rohilcund Hill Tracts; placing the administration of justice and the management of the revenue in the hands of the Lieutenant-Governor of the North-West Provinces.

Now all these Acts amount in one sense to a transfer of legislative power, because in each of them the Legislature entrusts to some other person or body of persons the making of laws and regulations, which it might have made itself.

Thus, instead of making laws for the regulation of the harbours of Madras and Bombay, it has transferred the power of making those laws to the Local Governments.

Instead of introducing the Procedure Codes into the Non-Regulation Provinces, it has left the introduction of those Codes to the discretion of the Local Governments.

Instead of organizing a system of judicature and Revenue laws for outlying districts such as Assam and the Chittagong and Rohilcund Hill Tracts, it has transferred to the Local Government the duty of making laws for these districts.

The difference between the transfer of authority in all these cases, and in that which we are now called upon to decide, appears to me *one of degree only, not of principle*; and if Courts of Justice had to determine in each of such cases how far the Legislature might or might not go in the creation of these important trusts, and in conferring powers upon high officials which they might have exercised themselves, the task would not only be one of extreme difficulty, but must lead in my opinion to most inconvenient results.

Has then the Legislature of this country been proceeding all these years upon a principle unwarranted by law? Has it been abdicating its proper functions and transferring powers which it had no right to transfer? The answer to this question will be found in the Councils' Act of 1861. That Act has put a construction upon the meaning of the Indian Charter of 1833, which it seems to me almost impossible to misunderstand.

It cannot seriously be supposed that the Imperial Parliament, when it was reconstituting and strengthening the Legislative Council in 1861, conferring upon it fresh powers, and subjecting it to restrictions which had not been previously imposed, could have been in ignorance of the mode in which the powers of legislation, which had existed for nearly thirty years, had been exercised by the Governor-General in Council.

The Acts of that Legislature had been regularly transmitted to England for the approval of Her Majesty in Council.

They were well known to the authorities at the India House. They had been considered by Her Majesty's advisers; and many of them, more especially the Procedure Codes, had been care-

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fully discussed and considered both in England and in this country.

The Act of 1859 was prepared and passed under the auspices of Sir BARNES PEACOCK; and the Acts of 1861 were also passed at the time when he was not only Chief Justice of the High Court, but also a member of Council.

It cannot be supposed, therefore, that if the provisions of those Acts had been contrary to law or even questionable, they would have escaped the vigilance of Sir BARNES PEACOCK, whose keen perceptions and long experience, both as a legislator and as a Judge, rendered him peculiarly capable of detecting any such illegality.

Nor, on the other hand, can it be supposed that the Imperial Parliament would have renewed in the Councils' Act of 1861 the legislative powers which the Governor-General in Council had so long exercised, if they had disapproved of the course of action which the Legislature had been pursuing.

The fact that, with the knowledge of the circumstances which they must be assumed to have possessed, Parliament did in the Councils' Act renew the powers which were given by the Act of 1833, appears to me to amount to a statutory acknowledgment, that the course of action which had been pursued by the Legislature in the exercise of those powers was one which the Act had authorized.

As regards the case of *Biddle versus Tarriny Churn Banerjee*, which has been relied upon by Mr. Justice MARKBY, I need only say, that, although I entertain the greatest respect for the learned Judges who took part in that decision, I cannot help considering that the view which they took in that case of the powers of the Legislature has been since virtually disregarded by the Legislature itself, and overruled by the Imperial Parliament by the construction which they have put upon the Act of 1833.

I believe that at the time when that case was decided, it was generally supposed that the power of the Legislature to transfer its authority was very limited. If that case were now law to the full extent of the decision, it would follow that a great many Acts of the Legislature, which have been acted upon as laws for years past, and are acted upon now, were altogether illegal.

I am, therefore, of opinion that Act XXII of 1869, the principle of which I cannot distinguish from that of the Acts which I have mentioned, was a law which the Legislature were justified in passing, and which did, in conjunction with the notification which was made under it, effectually remove the district in question from the jurisdiction of the High Court. But, as the majority of the Court are of a contrary opinion, the appeal made by the prisoners will be entertained, and the records will be sent for.

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It is much to be desired that this adverse judgment, and the vast importance of the question which it involves, may induce the Government of India to take this case, if it is open to them to do so, on appeal to the Privy Council.<sup>1</sup>

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In my opinion the Governor-General in Council has power by legislation to remove from the jurisdiction of this Court a District over which the Court was declared by the Letters Patent to have jurisdiction. That power seems to me to be expressly conferred by Section 9 of 24 and 25 Vic., c. 104,—without which section legislation on the subject would be wholly prohibited by the proviso in 24 and 25 Vic., c. 67, s. 22, namely, that the Governor-General in Council shall not have the power of making any law which shall repeal or in any way affect any of the provisions of that Act or of any Act passed in the same session, or thereafter to be passed, in anywise affecting Her Majesty's Indian territories or the inhabitants thereof.

These two Statutes 24 and 25 Vic., cc. 67 and 104, were passed within a few days of each other (one on the 1st of August, and the other on the 6th), and I think it clear that it was intended by Sections 9, 11, and 13 of the later Act to preserve to the Governor-General in Council certain legislative powers which otherwise, by reason of the proviso in Section 22 of Chapter 67, the Governor-General in Council would not have had. A consideration of the terms of the High Court's Act will show that the matters covered by the three Sections 9, 11, and 13—in which alone the legislative powers of the Governor-General in Council

<sup>1</sup> The appeal is now pending before the Privy Council, and will be reported in due course.

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are saved,—are the only matters relating to the High Court in respect of which the Governor-General in Council was intended to have legislative powers. And the express saving of these powers in Sections 11 and 13 was necessary, because those sections relate to matters not included or dealt with in Section 9. The Governor-General in Council has no legislative power in relation to the High Court save what is reserved to him by 24 and 25 Vic., c. 104; and the Letters Patent could give no such power not already given by that Statute.

Although I do not doubt that the conclusion arrived at in *Meares's case*<sup>1</sup> was correct, I do not concur in the construction there put upon these two Statutes. I dissent wholly from the theory, which seems to be the basis of the late Chief Justice's decision in *Meares's case*, that a declaration of jurisdiction contained in the Letters Patent can be affected by legislation by the Governor-General in Council, because the declaration in the Letters Patent is not a "provision of the Act" within the meaning of Section 22. In my opinion it is a provision of the Act within the meaning of Section 22; and, as such, the legislative powers of the Governor-General in Council would be wholly barred in respect of it were those powers not given or reserved to the Governor-General in Council by Section 9 of the High Court's Act. It is only, so far as legislative powers are expressly given or reserved by 24 and 25 Vic., c. 104, that the Governor-General in Council has any legislative authority over the jurisdiction, &c., of the High Court. Section 9, however, does seem to me to give the Governor-General in Council plenary powers of legislation as regards the jurisdiction. For I read that section as declaring that the Court shall have and exercise all such civil and other jurisdiction, original and appellate, and all such powers in relation to the administration of justice in the Presidency, as the Letters Patent shall direct: and save as by the Letters Patent otherwise directed, and subject and without prejudice to the legislative powers of the Governor-General in Council in relation to the matters aforesaid (*i.e.*, all the matters mentioned in Section 9 with which the Crown is authorized to deal in the Letters Patent), the Court shall have and exercise all jurisdiction and

<sup>1</sup> 22 W. R., 54; 14 B. L. R., 106.

every power, &c., in any manner vested in the abolished Courts (Supreme and Sudder) of the same Presidency. The section, in short, vested in the new Court all the jurisdictions and all the powers of every description of the two abolished Courts, except so far as those jurisdictions and powers might be altered or taken away by the Letters Patent or by subsequent legislation by the Governor-General in Council.

This construction of the Statute no doubt leads to the conclusion that the Governor-General in Council has power to alter wholly, and to take away the jurisdiction of the High Court; and, further, that the Governor-General in Council is the only authority in India by which the jurisdiction or powers of this Court can be altered or in any way affected. Nevertheless, it appears to me to be the right construction: and it is the construction which, as a matter of fact, was invariably put upon the law up to the time of *Meares's case*. If it be the right construction, it cannot be questioned that the Governor-General in Council could legally remove the Cossyah and Jynteah Hills from our jurisdiction.

But it is argued that, if the Governor-General in Council had this power, it has not been legally exercised, inasmuch as the Governor-General in Council did not attempt or profess to remove the Cossyah and Jynteah Hills from the jurisdiction of the High Court, but merely passed an Act authorizing the Lieutenant-Governor to remove them if he at any time should think fit to do so. And it is contended that a removal by an order based on the authority thus given to the Lieutenant-Governor of Bengal is not legal.

It is an undeniable fact that the Governor-General in Council did, by Act XXII of 1869, empower the Lieutenant-Governor of Bengal at his pleasure to extend the provisions of the Act to the Districts in question, and that by virtue of the power so conferred on the Lieutenant-Governor those provisions have since been extended in the manner contemplated.

The first question which here arises is, whether the Governor-General in Council, having passed such an Act, this Court can decline to recognize or be bound by it, on the ground that it was *ultra vires* of the Governor-General in Council to legislate in such a fashion, i.e., to delegate to the Lieutenant-Governor of Bengal

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functions which were expressly vested in the Governor-General in Council.

In considering this matter, it is necessary to go back a little and see what the legislative powers of the Governor-General in Council really are.

The Statute 3 and 4 Will. IV, c. 85, s. 43, gave the Governor-General in Council power to make laws for repealing or altering any laws or regulations whatever then in force or thereafter to be in force (in British India, &c.), and for all persons of whatever nationality,—and for all Courts of Justice, whether established by Royal Charter or otherwise, and the jurisdiction thereof,—*save and except* that the Governor-General in Council was not to have power by legislation to repeal or alter any of the provisions of that Act (3 and 4 Will. IV, c. 85) or of any Act to be thereafter passed affecting the East India Company or the said territories or the inhabitants thereof, &c. This power of legislation was (section 44) subject to the right of the Court of Directors to disallow any law which might have been passed, which was thereupon (*i.e.*, if disallowed) to be repealed.

By section 45 it was enacted—and this section stands unrepealed to the present day—that all laws made as aforesaid (*i.e.*, by the Governor-General in Council under the powers given by that Act) “shall be of the same force and effect within and throughout the said territories as any Act of Parliament would or ought to be within the same territories, and shall be taken notice of by all Courts of Justice whatsoever within the same territories, in the same manner as any public Act of Parliament would and ought to be taken notice of; and it shall not be necessary to register or publish in any Court of Justice any laws or regulations made by the said Governor-General in Council.”

By the Statute 16 and 17 Vic., c. 95, the Council of the Governor-General for legislative purposes received a new constitution; but the legislative powers of the Council and the effect to be given to its Acts remained as they were under Statute 3 and 4 Will. IV, c. 85.

The Statute 17 and 18 Vic., c. 77, s. 3, empowers the Governor-General in Council, with the consent of the Home authorities, from time to time, by proclamation, to take any Di-

trict under the immediate management of the Governor-General of India in Council, and thereupon to give all necessary orders respecting the administration of such District, or otherwise to provide for the administration thereof. But it is expressly provided that no law or regulation in force in any such District, at the time it is so taken under the immediate management of the Governor-General of India in Council, shall be altered or repealed, except by law or regulation made by the Governor-General of India in Council.

Then came the Indian Councils' Act, 24 and 25 Vic., c. 67, which again gave a fresh constitution to the Council of the Governor-General for making laws and regulations. This Act, however, to describe it generally, left the legislative powers of the Governor-General in Council unaltered, save that local legislatures were re-established, and certain matters appertaining more peculiarly to the Executive were declared (section 19) not to be cognizable without the previous sanction of the Governor-General. The legislative power which was taken away from the Presidencies of Madras and Bombay by 3 and 4 Will. IV, c. 85, was, in a modified degree, restored to them; and the establishment of a local legislature for Bengal was authorized. The legislative powers conferred on the Governor-General in Council by 3 and 4 Will. IV, c. 85, were left unimpaired; but, under the new Act 24 and 25 Vic., c. 67, were to be exercised for the most part in matters of more general administration and such as affected the interests of the Indian Empire at large.

In the preamble of the Councils' Act it is merely recited that it is expedient that the provisions of former Acts of Parliament respecting the constitution and functions of the Governor-General in Council should be consolidated, and in certain respects amended.

The second section repeals sections 40, 43, 44, 50, and certain other Sections of 3 and 4 Will. IV, c. 85; and it is declared that all other enactments then in force, with relation to the Council of the Governor-General of India, or to the Councils of the other Presidencies, shall continue in force, "save so far as the same are altered by, or are repugnant to, this Act."

Section 22 declares the powers of the Governor-General in Council as regards the subjects of legislation. It is, in truth,

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a mere re-enactment of the repealed section 43 of 3 and 4 Will. IV, c. 85, altered formally and with reference to the changes which were being made in the constitution of the Council. It gives the Governor-General in Council power to repeal or alter any existing law of whatever kind, save that it expressly provides that the Governor-General in Council shall not have the power of making laws or regulations which shall repeal or in any way affect any of the provisions of the Act itself (24 and 25 Vic., c. 67), or any of the then unrepealed sections of 3 and 4 Will. IV, c. 85, and 17 and 18 Vic., c. 77, and certain other Statutes named,—and save also that the Governor-General in Council shall not have power to make laws which repeal or affect any provisions of any Act passed in the then present Session of Parliament, or thereafter to be passed, in anywise affecting Her Majesty's Indian territories or the inhabitants thereof.

The 3 and 4 Will. IV, c. 85, remains in force, except so far as it is expressly repealed or is repugnant to the Councils' Act. Section 45 is still unrepealed, though the Councils' Act repeals the two sections immediately preceding and section 50 which follows it. And there is nothing in Section 45 repugnant to the Councils' Act. Therefore, it is clear that Section 45 is still in force, and applies to all laws made by the Governor-General in Council under the Councils' Act. Of course, an Act passed by the Governor-General in Council in contravention of section 22 of 24 and 25 Vic., c. 67, would not be an Act duly passed, the legislative powers of the Governor-General in Council being by that section expressly barred in such cases. But an Act passed by the Governor-General in Council under the Councils' Act, and not falling within any of the prohibitions therein contained, seems under section 45 of 3 and 4 Will. IV., c. 85, to have the same effect here as an Act of Parliament would or ought to have; and it must be taken notice of by us in the same manner as any public Act of Parliament. If this be so, this Court has no power to question the authority of the Governor-General in Council, once satisfied that the Act is not within any of the prohibitions of the Councils' Act. For there is no doubt that, had a public Act of Parliament been passed in the same terms as Act XXII of 1861, we should have been bound to accept it without question.

But, if it be open to me to question the authority of the Governor-General in Council to pass a law which does not fall within any of the restrictive provisions of 24 and 25 Vic., c. 67, I am unable to say that the Cossyah and Jynteeah Hills have not been legally removed from the jurisdiction of the High Court.

By section 4 of the Act, the Governor-General in Council did expressly remove the Garo Hills from our jurisdiction, leaving it, however, to the Lieutenant-Governor of Bengal to fix the date from which the removal was to have effect. Then (sections 5-8) the Governor-General in Council practically left it to the Lieutenant-Governor to provide as he should think fit for the administration, in all respects, of the district, and gave authority to the Lieutenant-Governor to extend to the Garo Hills any law, or any portion of any law, then in force in the other territories subject to the Lieutenant-Governor, or which might thereafter be enacted by the Council of the Governor-General, or of the Lieutenant-Governor for making laws and regulations.

As regards the Cossyah and Jynteeah Hills, after in Section 3 repealing Act VI of 1835 (which repeal, it may be noted, did not of itself in any way affect the jurisdiction of the High Court over those Hills), the Governor-General in Council by section 9 empowered the Lieutenant-Governor from time to time to extend, *mutatis mutandis*, all or any of the provisions contained in the other sections of the Act to the Cossyah and Jynteeah Hills. It is left to the Lieutenant-Governor to say whether these districts shall be removed from the Court's jurisdiction or not; and also, if removed, what law shall be administered in them. No doubt, the whole future position of the Cossyah and Jynteeah Hills is left absolutely to the discretion of the Lieutenant-Governor. For all that is really decided by the Governor-General in Council is that it is fit and proper that the Cossyah and Jynteeah Hills shall be removed from the jurisdiction of the High Court if the Lieutenant-Governor shall think it right at any time that they shall be so removed. No other matter is actually decided by the Governor-General in Council than that it is right that these districts shall be made over wholly to the Lieutenant-Governor's control, if and when he chooses to take them over.

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It is impossible to deny that this is practically an entire delegation to the Lieutenant-Governor by the Governor-General in Council of the legislative powers of the Council. But on what precise grounds can I say that such delegation is illegal? The Act does not fall within any of the restrictive provisions of the Statute 24 and 25 Vic., c. 67; and there is no positive law which prohibits such delegation. The question is really one of intention: What powers did the Supreme Legislature intend to confer on the subordinate Legislature, the Council of the Governor-General of India for the purpose of making laws and regulations?

Reading the Councils' Act with the High Courts' Act, 24 and 25 Vic., c. 104, it is sufficiently clear that the intention of the Supreme Legislature was, that the jurisdiction of the High Court should remain as defined in the Statute, c. 104, except so far as otherwise declared by the Letters Patent, or by the legislative enactments of the Governor-General in Council. And it is fairly argued that, if the Statutes gave no power of legislation in such matters to any authority in India, save the Governor-General in Council, it could not have been the intention that the Governor-General in Council should, by legislation, confer on the Lieutenant-Governor these powers which it was clearly intended should be exercised by the Governor-General in Council alone.

But, although I do not doubt that the Governor-General in Council is the only authority in India who can by legislation affect the jurisdiction of this Court, I am not prepared to say that, if the Legislative Council of the Governor-General passes an Act declaring that such rules affecting the jurisdiction as the Lieutenant-Governor may make shall have the effect of law, and if rules affecting the jurisdiction are thereupon made by the Lieutenant-Governor, the alteration of the jurisdiction would be otherwise than by the Governor-General in Council in exercise of their legislative powers. For, if we hold that the Governor-General in Council must, if the object is to affect the jurisdiction of this Court, do it by the direct act of the Council assembled for the purpose of making laws and regulations, and cannot do it through authority given by that Council to the Lieutenant-Governor or any other functionary, we are, in fact, legislating and imposing a

restriction on the legislative powers of the Governor-General in Council which is not imposed by the Statute.

There are, as I have said, grounds for arguing that the intention was that legislation to affect this Court's jurisdiction should be by the Governor-General in Council directly and not by delegation. On the other hand, the Statute does not expressly say so; and it might have been expected to say so if such had really been the intention, inasmuch as, for years prior to the passing of the Statutes of 24 and 25 Vic., powers of legislation had been delegated repeatedly by the Governor-General in Council to the Lieutenant-Governor and other executive officers, and it may be presumed that in framing these Statutes provision would have been made against a repetition of the evil had it been deemed in fact to be an evil.

Act XXII of 1869 is certainly an exceedingly strong instance of legislation by the Governor-General in Council in a manner amounting to a delegation to the Lieutenant-Governor of Bengal of the legislative powers of the Council. Still, powers of a similar nature (though usually not so extensive) have constantly for years past been given by the Governor-General in Council by legislation to various executive authorities. It is very difficult, for example, to distinguish in principle the present case from that of the Civil Procedure Code (Act VIII of 1859), which, by Section 385, took effect in any part of the territories not subject to the general regulations only when extended thereto by the Governor-General in (Executive) Council, or by the Local Government to which the particular territory happened to be subordinate. In like manner, the first Criminal Procedure Code (XXV of 1861) took effect in Non-Regulation Districts only when extended to them by the Governor General in (Executive) Council, or by the Local Government to which the territory was subordinate. It is substantially neither more nor less than a delegation of legislative authority to say to the Lieutenant-Governor or any other officer: "Here is a new Code; but it is left wholly to your discretion to decide whether—and, if at all, when—it is to be applied to such and such territories now under your government." The principle in these and other such cases is really the same as in the case now before us; yet such delegations are frequent.

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Altogether, I do not think that the passing of Act XXII of 1869 was absolutely *ultra vires* of the Governor-General in Council; and, after the course of practice which undoubtedly has been followed in this matter for very many years, I should certainly decline to declare such an Act to be beyond the powers of the Governor-General in Council, unless I considered it clear beyond all question that it was so.

I think, therefore, that we have no jurisdiction to entertain this appeal.

Various important points, which I have not touched upon, have been discussed in the course of the argument; but, in the view which I take of the position of the Legislative Council of the Governor-General with reference to this Court, it seems to me unnecessary to go further into them.

PONTIFEX, J. PONTIFEX, J. :—

I concur in the judgment of Mr. Justice MACPHERSON.

JACKSON, J. JACKSON, J. :—

Assenting, as I do, to the decision in *Feda Hossein's case* (I. L. R., 1 Cal., 431), and being therefore of opinion that the jurisdiction of the High Courts can be affected by legislative action of the Governor-General of India in Council, and by no other authority in this country, I have only to consider whether our jurisdiction has been validly taken away; and whether, if we should think otherwise, we are competent to give effect to our opinion.

It is contended on behalf of the Crown that the jurisdiction of this Court over the Cossyah and Jynteeah Hills was put an end to by a notification of the Lieutenant-Governor of Bengal, dated 14th October 1871, which notification purports to have been issued under the authority of the 9th section of an Act of the Governor-General in Council, called Act XXII of 1869, which received the assent of the Governor-General on the 24th September of that year.

It is further contended that the clause of this Act, which empowered the Lieutenant-Governor to issue such proclamation, is a law made by the Governor-General in Council under the authority

of 24 and 25 Vic., c. 67; that by virtue of clause 45, 3 and 4 Will. IV., c. 85, a law so made is of the same force and effect in India as any Act of Parliament, and that consequently neither this nor any other Court in India is competent to inquire into the validity of the Act, or to question the mode in which the Legislature carries out its conclusions.

I will address myself first to the latter branch of this argument, and for this purpose it is necessary to state what my opinion is regarding the constitution and powers of the Indian Legislature.

This body is composed of the members of the Executive Government, with the addition of certain persons (not to be less than six or more than twelve in number) nominated by the Governor-General as members of the Council for the purpose of making laws and regulations only. It derives its powers from Parliament and from no other source,<sup>1</sup> and those powers are to be exercised in a particular manner and are compassed by certain bounds.

The powers in question, sparingly granted at first, subjected originally—and down to 1834—to the necessity of registration in the Supreme Courts, and thereafter to the inspection and control of both Houses of Parliament, were gradually enlarged by successive regulating Acts, until they reached their present limits.

They are now defined by the Statute known as the Indian Councils' Act, 1861.

By that Act the Council, when constituted for legislative purposes, was declared absolutely incapable of transacting any business, or entertaining any motion other than the consideration and enactment, or the introduction, of measures of a legislative kind, except that it might amend the rules for the conduct of its business which had been made before it came into existence.

The legislative powers committed to the Governor-General in Council are described, and the restrictions on them set forth in the 22nd clause of the Statute.

It was observed during the argument that there is a distinction between the grant of powers which are absolute, except as to matters expressly reserved, and that of powers extending only up to certain limits, not beyond; it was contended that the former of

<sup>1</sup> See Forsyth's cases and opinions on Constitutional Law, p. 17. See also Harington's Analysis, first part, section 1.

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these was the description applicable to the powers of the Indian Legislature. It seems to me that the contrary is the case for the following reasons :

The section which defines, and guards by various provisoes, the powers conferred for legislative purposes is thus entitled : " Extent of the powers of the Governor-General in Council to make laws and regulations at such meetings." It is no doubt one of the rules for construing Statutes that no weight is to be allowed to the marginal notes, nor should I refer to this one, but that the powers for like purposes entrusted to Governors in Council are similarly defined in clauses 42 and 43, and such defining clauses are afterwards referred to in clause 48 as provisions *limiting* the power of the Governors in Council. The powers expressly conferred by section 22 are,

" Subject to the provisions herein contained, to make laws and regulations for repealing, amending or altering any laws or regulations whatever now in force, or hereafter to be in force in Indian territories, and to make laws and regulations for all persons, and for all Courts of Justice whatever, and for all places and things whatever within the said territories, and for all servants of the Government of India within the dominions of Princes or States in alliance with Her Majesty."

This language appears to me to contemplate the exertion and exercise of the legislative mind of the Council in relation to the subject-matters indicated, and not to include the enabling of any person or any body of persons to repeal laws at their pleasure, or to make laws for Courts of Justice or the like.

But, before pursuing this topic further, I return to the question of the competency of this Court to discuss the validity of the Act ; and on this point I think that one argument may be derived in favor of the opinion which I hold from the very provision of the Act of William IV, on which the advisers of the Crown have placed so much reliance. If we are to interpret the 45th Section of that Statute in the way contended for—and the words are given the fullest sense of which they are susceptible—it would be necessary to hold that an Act of the Indian Legislature once passed, whether it observed or transgressed the provisoes, would be good and valid until repealed, for the words of the section are " that *all* laws and regulations made as aforesaid (which means *vide* Section 44, ' by the said Governor-General in Council made' )

so long as they shall remain unrepealed shall be of the same force and effect," &c.

Now, it is not contended that a law and regulation, made by the Governor-General in Council, forbidding the Secretary of State from borrowing money in England for the service of India, or altering the Mutiny Act, would be valid, or would have any force or effect; and, therefore, some limitation must be put upon the sweeping terms of section 45.

But it seems manifest that Parliament must have had in mind the possibility and propriety of such laws being questioned on grounds apart from the breach of any of the provisos contained in section 22. For section 24 expressly provides that—

"no law or regulation made by the Governors-General in Council . . . . shall be deemed invalid, by reason only that it affects the prerogative of the Crown ;"

and the 14th Section provides that—

"no law or regulation made by the Governors-General in Council, *in accordance with the provisions* of this Act, shall be deemed invalid, by reason only that the proportion of non-official members hereby provided was not complete."

Clearly, therefore, in these cases it was thought necessary to protect the laws in question from being called in question, and the place of question must certainly have been the Courts in this country.

From these premises, therefore,—the limited character of the Legislature, the conspicuous absence of sovereign, or even general powers, the language of the Statute in section 48, and the provision against challenge on specified grounds,—I deduce the opinion that the Courts in India must have the power of examining the Acts of the Indian Legislatures for the purpose of enquiring whether they have been made in accordance with the limited (though doubtless extremely large) powers conferred by Parliament, and also in the manner prescribed by Statute; and further, that the effect and force attributed to such Acts by section 45 of 3 and 4 Will. IV, c. 85, belongs only to laws passed under those same conditions.

But it is further contended that, if the Courts have any such power, it can only apply to the provisions touching forbidden subjects, or to those connected with the enacting machinery which are contained in the Statute, and that it cannot extend to criticising

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the mode in which the Legislature thinks fit to carry out its intentions.

If this were so, my answer to the objection would be, that in the case before us the Legislature has expressed no intention at all, but has merely given anticipative sanction to any course which the Local Government may, at any time, think fit to take in reference to a matter as extensive and important as any matter can be.

But I think this Court is bound, where its jurisdiction is concerned, and more especially in a matter of criminal jurisdiction, to examine every objection to the validity of an Act, not of course in a captious spirit, remembering indeed that it is under the Legislature, but also that both are the creatures of Parliament.

I have already said that the language of the 22nd Clause of the Indian Councils' Act appeared to me not to warrant the handing over to any specified person the power to repeal or to make laws, and it is manifest that such is the effect of section 9, Act XXII of 1869. It in fact enables an authority, quite distinct from the Government of India in either its legislative or its executive capacity, to abolish, if it thinks fit, all tribunals and all constituted authorities in a given tract of country, and to do so at any future time, and with reference to a condition of things not even approximately understood by the Legislature.

In point of fact, the discretion entrusted to the Lieutenant-Governor was not exercised till more than two years after the passing of the Act,—was not exercised at all by the Lieutenant-Governor in office when it was passed, nor even was that Lieutenant-Governor a member of the Council which passed it; for the Act, as is well known, was passed at Simla, where, by Statute, the Lieutenant-Governor of the Punjab, and not the Lieutenant-Governor of Bengal, sits in the Indian Legislature.

It seems to me, therefore, clear that the mind of the Governor-General in Council was not, and could not, have been applied at all, for legislative purposes, to the circumstances of the Cossyah and Jynteah Hills in or about October 1871, and that he did not by any law, at that or any other time, take away the jurisdiction of the High Court.

The Legislature, being competent to take away by a law this Court's jurisdiction, might also no doubt by a law declare that at

the end of two years such jurisdiction should cease ; but it made no such law, and evidently had not made up its mind upon the subject one way or the other.

Bentham, in his *Chrestomathia* (Works, Vol. VIII, page 94, note), defines a law as—

“a discourse . . . . . expressive of the *will* of some person or persons to whom, on the occasion and in relation to the subject in question, whether by habit or express engagement, the members of the community to which it is addressed are disposed to pay obedience ;”

and he gives a very similar definition elsewhere (Vol. III, p. 215).

A Regulation can be hardly a less positive or determinate expression of will enforced by sanction.

If a *law* includes a declaration that a given person may do, or not do, a particular thing, as he chooses, and if the permissive enactment in section 9, Act XXII, is a lawful exercise of the legislative power conferred on the Governor-General in Council, then it would be equally within that power to enact that it should be competent to the Lieutenant-Governor to abrogate and to re-introduce at his pleasure the whole of the existing law in every part of the Lower Provinces.

That, it will doubtless be said, would be a lawful, but an absurd and culpable stretch of legislative power ; and it ought to be assumed that no such extravagance could emanate from the Governor-General in Council, but in truth the case supposed is not by many degrees removed from the case before us ; only the character of such an Act is palpable when applied to our own case, which escapes observation when it refers to a distant and little-known object.

At any rate, the argument for the Crown is capable of being pushed to the most dangerous lengths ; and, if the case appeared to me only doubtful, I should think it more reasonable to conclude that Parliament had not intended to allow a latitude which might, though it presumably would not, be so abused.

But there are other reasons which, as I think, point with equal plainness to the same conclusion. Parliament itself seems to have commented on this matter, in some places indirectly, in others directly.

The 25th section of the Indian Councils' Act recites that it has been doubted whether the Government of India had the power of

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making rules or laws for the Non-Regulation Provinces otherwise than by way of formal legislation, and it then proceeds to validate all such rules or laws made *prior to the passing of this Act*. Now, irrespectively of what seems to me the unmistakable provision in favour of *past rules only*, it occurs to me to ask why, if the powers of the Indian Legislature have as wide an extent as is claimed for them, resort was had to the authority of Parliament in this matter? Why should not the Governor-General in Council have passed an Act legalizing such rules of previous date, and permitting them for the future? It was, it seems to me, because its powers were considered unequal to that strain, and because Parliament, in legalizing the past, thought it not right to sanction the practice in the future.

A somewhat similar measure of those powers is presented by the enactment of the Statute 34 and 35 Vic., c. 34, which it seems to me, in the view contended for on the part of the Crown, would have been at least in part superfluous.

These declarations of the British Parliament seem to me on the one hand to indicate a distinct view as to the powers of the Indian Legislature, and on the other an equally distinct determination that every relaxing of the strict rule as to the form of legislation should emanate from itself.

In short, it seems to be clear that, after the passing of the Indian Councils' Act down to 1870, all legislation for every part of British India was required to be by laws passed at a meeting for making laws and regulations.

That undoubtedly was, and probably continues to be, the opinion of Sir Henry Maine, for it is plainly so stated in a paper of his written in 1868, which he has published as an Appendix to his work on Village Communities. And on this point I think myself justified in referring to the despatch of Sir Charles Wood in transmitting a copy of the Indian Councils' Act to Lord Canning's Government.

I am aware that there is high authority against such references, and also of the danger in some instances of making them; but the despatch is in this instance to be used against the Crown, whose Minister Sir Charles Wood then was; and I believe there is no reason whatever for supposing that the Secretary of State was not

on that occasion a perfectly faithful interpreter of the meaning of Parliament, or that the decision of Parliament in this particular was at all other than what the Ministry intended it to be.

Sir C. Wood says in paragraph 27 of the despatch (written in August 1861): "You will observe, however, that henceforth legislative measures affecting any of the territories, Regulation or Non-Regulation, under the dominion of Her Majesty at the date of the passing of the Act, must be passed either by the Council of the Governor-General or by that of the Government to which such territories may be subject."

It would be, I think, a very imperfect and unreal compliance with that injunction, if the Governor-General in Council contented himself with a legislative declaration that the local Executive might, in a given locality, do anything that pleased it.

But further, as in regard to some of these provinces a more convenient and flexible procedure was found to be requisite; and, as the remedy was in the hands of Parliament, a further Act was passed in 1870 (33 Vic., c. 3), wherein it was declared to be expedient that provision should be made to enable the Governor-General of India in Council to make regulations for the peace and good government of certain territories in India otherwise than at meetings for the purpose of making laws and regulations; and provision was made accordingly.

It cannot have been intended that there should be in existence, simultaneously, two methods of changing the law for such territories; and I should, therefore, consider that for this reason alone, the course taken under the Act of 1869 about a year and a half after the passing of the Statute just mentioned, was bad; but I also think it in plain contravention of the Indian Councils' Act.

As to the nature and extent of the legislative powers intended to be conferred on the Indian Government (it is really that) by the Indian Councils' Act, any one who desires to observe how differently Parliament works when it gives complete authority, reserving only its own supreme and paramount rights, need only compare that Act with the Statute 30 Vic., c. 3, constituting the Dominion of Canada with its superior and subordinate Legislatures.

One argument, however, which was much relied on, I must not leave unnoticed, although I do not deal very fully with it.

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Our attention was drawn to a great number of instances in which, beginning from 1844-45 and coming down to the present time, a power had been exercised more or less analogous to that used in the present instance; and with reference to these enactments it was contended, *first*, that a long course of legislation of the permissive or delegatory kind must be taken to have established the practice, and, therefore, the authority of that course; and, *secondly*, that, inasmuch as many of such enactments were anterior to the Indian Councils' Act, Parliament must be taken to have noticed the course of practice, and by passing it over in silence to have sanctioned what it observed.

As to this it seems to me in the first place that the great majority of the Acts named in the list handed up to us differ so widely from the present one as to be of little value for the purpose of the argument.

It often happens, and must often happen, that the usurpation of a power passes unnoticed, or at least unchallenged, when the occasion is insignificant, or when the attendant circumstances appear to justify or to excuse the encroachment.

To leave to an inferior or a different authority the provision of means for carrying out a law, or to entrust to its discretion the choice of a precise date for putting it in force, appears to me not incompatible with the retention by the Legislature in its own hands of the principal decision as to the policy of the law; and many of the Acts referred to go no further than this trifling delegation.

Speaking without any claim to precision, because I have not thought myself bound to go through the list, I venture to affirm that not more than two or three of these instances can be at all classed in importance, and in departure, as I view it, from the statutory powers of the Government of India to legislate, with the present one; and, as the questioning of such assumptions of power is matter of accident not originating with the Courts, no argument can be founded on their having hitherto passed unnoticed by the Judges. With Parliament of course the case is widely different. The sovereign Legislature intervenes when and as it pleases, of its own motion or impelled thereto from outside; and if any consent could be inferred from the silence of Parliament, the Courts would be con-

cluded. But, on such a topic as this, I do not think that we are bound to presume the knowledge of Parliament, or that it would be safe to draw so important an inference from its silence.

It cannot be said that the practice under consideration has ever been free from doubts as to its legality. Judicial doubts on the subject were expressed in the case of *Biddle vs Tarriny Churn Banerjee*<sup>1</sup>, to the decision in which case, so far as it went, we are bound to pay the highest respect; and we may feel tolerably certain that, if the matter had attracted the attention of Parliament, it would have been dealt with in a manner similar to that adopted in the 25th Section of the Indian Councils' Act, that is to say, the doubts would have been recited, and the practice legalized either for the past or for all time. I am unable, therefore, to assume even that Parliament was cognizant of, still less that it intended by silence to approve, the mode of legislation referred to.

Upon these considerations it seems to me that the notification of the Lieutenant-Governor, issued under authority of Act XXII of 1869, section 9, could not have the effect of putting an end to the jurisdiction of the High Court. I take it as clear that this Court had jurisdiction in the Cossyah and Jynteah Hills, because that was a jurisdiction vested in the Court of Nizamut Adawlut at the time of its abolition; and the result is that, *me judice*, such jurisdiction has not been validly taken away, but still exists.

I wish now to say that, when I first committed to writing the views which I hold upon this very important question, I found myself to have arrived, by a nearly similar train of reasoning, at the same opinion which my brother MARKBY has expressed with a fulness of treatment, and an amplitude of research to which I do not pretend. I might have adopted, perhaps, every word of that exhaustive judgment, but I thought it on the whole more respectful to the Government, as well as more satisfactory to myself, that I should indicate, however slightly, the grounds of my own independent conclusion.

AINSLIE, J. :—

By 3 and 4 Will. IV, c. 85, s. 43, the Governor-General in Council had power to make laws and regulations for repealing,

<sup>1</sup> Taylor and Bell, p. 409.

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amending or altering any laws or regulations whatever then in force, or thereafter to be in force, in the Indian territories of His Majesty or any part thereof, and to make laws and regulations for all persons and all Courts of Justice and the jurisdiction thereof, and for all places and things whatsoever throughout the whole and every part of the said territories, with certain reservations; and by section 45 all laws made, *as aforesaid*, were to have the force and effect of Acts of Parliament.

By 16 and 17 Vic. c. 95, s. 22, provision was made for the better exercise of the powers of making laws and regulations by the addition to the Council of the Governor-General of certain persons as Legislative Councillors, and by section 23 it was enacted that the powers of making laws or regulations vested in the Governor-General in Council should be exercised only at meetings of the said Council at which a certain number of Members and certain particular Members should be present.

By 24 and 25 Vic. c. 67, s. 2, the 43rd section of the Act of William IV, and the 22nd and 23rd sections of the Act of 16 and 17 Victoria are repealed, but the 45th section of the former is maintained in force, save so far as the same may be altered by or be repugnant to this Act.

Sections 9 and 10 provide for the constitution of a Legislative Council, and section 15 restricts the power of making laws and regulations to meetings of the Council at which a certain proportion of Members is present; by section 6 the Governor-General alone is authorised in certain cases to exercise all the powers of the Governor-General in Council *except the power of making laws and regulations*.

Section 22 re-enacts the provisions of section 43 of the Act of William IV, with the addition that the power is capable of being exercised at meetings of Council for the purpose of making laws and regulations, at which by section 19 no other business can be transacted, and except at which by section 15 no laws or regulations can be made.

Section 25 validates certain laws and regulations theretofore made otherwise than at meetings of a Legislative Council in respect of the Non-Regulation Provinces.

By section 23, the Governor-General, in cases of emergency,

may make ordinances for the peace and good government of the Indian territories of Her Majesty or any part thereof, to have effect for six months only and subject to be controlled or superseded by a law made at a meeting of the Legislative Council.

Sections 34 and 45 restrict the power of making laws and regulations conferred on Subordinate Legislatures, so that as in the case of the Council of the Governor-General it can only be exercised at a meeting for the purpose of making laws and regulations, and in no case can they modify Acts of the Imperial Parliament.

The 1st section of 33 Vic. c. 3, provides that in respect of any part of the territories under the Government or administration of any Governor, Lieutenant-Governor, or Chief Commissioner to which the Secretary of State shall from time to time by resolution declare the provisions of the section to be applicable, the Governor, Lieutenant-Governor or Chief Commissioner, as the case may be, may propose drafts of regulations for the peace and good government of such parts to the Governor-General in Council which, on receiving his assent and being duly published, shall have the force of *laws made at a meeting of the Legislative Council*.

There is further a provision in 17 and 18 Vic. c. 77, s. 3, by which the Governor-General in Council (with the sanction of the Court of Directors of the East India Company) could, by proclamation, take under the immediate authority and management of the Governor-General in Council any part of the territories under the Government of the East India Company, and thereupon could give all necessary orders and directions respecting the administration of such part, or otherwise provide for the administration of the same; but this is coupled with a proviso that *no law in force at the time in such part should be altered or repealed, except by a law made by the Governor-General in Council*.

The Imperial Parliament has thus carefully declared the mode in which legislation by the Government of India is to be carried on. Ordinarily it is to be by laws made at meetings of the Legislative Council of the Governor-General; under emergencies and for the limited term of six months by the Governor-General alone; and in respect of particular places, to be defined by the Secretary of State, by the Governor-General in (Executive) Council on the proposal of the Local Government.

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When Act XXII of 1869 was passed, the last provisions had not come into existence. This Act was passed by the Governor-General in Council under the general powers conferred by section 22 of the Indian Councils' Act, subject to the limitations specified in that section.

The question is, whether the Supreme Indian Legislature did itself, directly or by necessary implication, exclude the Cossyah and Jynteah Hills from the territorial jurisdiction of the High Court? I confine myself to this one matter, which is all that we need consider for the purposes of the appeal before us at the present stage of the proceedings. I understand we are all agreed that such exclusion is within the powers of the Legislature.

I think it did not do so, but that it left the question of such exclusion unsettled. The preamble and title of the Act speak only of the Garo Hills; the Cossyah Hills are not mentioned until section 9 is reached, except that in section 3 it is said that, from the date of the notification provided for in section 2, Act VI of 1835 (so far as it relates to the Cossyah Hills) shall be repealed. With this exception, the first eight sections refer exclusively to the Garo Hills. Then comes the 9th section, which empowers the Lieutenant-Governor, from time to time, by notification in the *Calcutta Gazette*, to extend all or any of the provisions of the other sections to the Jynteah Hills, the Naga Hills, and to such portion of the Cossyah Hills as for the time being forms part of British territory.

This provision for a separate notification makes it clear that no part of the territory mentioned in section 9 is affected by the Act in consequence of the notification provided for in section 2; and that, if the Act has any operation there, it is simply as the result of the will of the Lieutenant-Governor. The repeal of so much of Act VI of 1835 as affects the Cossyah Hills from the date when the Act came into force in the Garo Hills (namely, the 1st March 1870) is of no practical importance; this much of the Act was wholly obsolete. The Courts of Sudder Dewanny and Nizamut Adawlut, to which powers of superintendence had been given by the Act, had ceased to exist, and by the 9th section of the High Court's Act (24 and 25 Vic., c. 104), this Court had been vested with the same powers that the former Courts had.

That the Government of India in Legislative Council should take the opportunity of repealing this obsolete Act at the same time that it was dealing with the law applicable to the Garo Hills, is not to my mind sufficient ground for saying that the Legislature in September 1869 made a declaration in respect of the Jynteeah, the Naga, or the Cossyah Hills similar to that which it had made in respect of the Garo Hills. As to these last, certain provisions were absolutely enacted, and all that was referred to the Lieutenant-Governor was to fix a day from which they should take effect.

The preamble declares the expediency of dealing with the Garo Hills, but says not a word about the others. The notification necessary to start the operation of the Act, in respect of the Garo Hills, has no effect in the Cossyah and other hills. Whether or not the Act shall ever come into operation at all in the latter, and if so, the extent to which effect shall be given to it, is left entirely to the discretion of the Lieutenant-Governor. The 2nd and 9th sections are not framed in the same form. The first directs that the Act shall come into operation, and that the Lieutenant-Governor shall fix a date of commencement, and merely leaves the particular date to be determined by the Lieutenant-Governor as is commonly done when the introduction of a new law requires some adjustment of the administrative machinery.

The fixing of such date is a ministerial not a legislative act; but the determination whether the law shall be applied at all is not a ministerial but a legislative act. As this determination was not arrived at by the Supreme Legislature, but was remitted to the discretion of the Lieutenant-Governor, it cannot be said that the Legislature excluded the Cossyah and Jynteeah Hills from the jurisdiction of the High Court; it went no further than to say that, if at any time the Lieutenant-Governor shall think fit to exclude them, he may do so. In fact, the Lieutenant-Governor did not avail himself of the power for two years after the passing of the Act, whereas he issued the notification under section 2 within five months from that time, and it rested entirely with him to determine whether he ever would avail himself of it, and if so in what District and to what extent. He might possibly have determined only to apply the provisions of section 5, relating to the

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public revenue and rent, and of section 7, as to cesses, in one tract, while he applied the whole law in another. The Supreme Legislature could have no knowledge beforehand of what would be the results of the passing of the Act. It certainly cannot be said that the four hill tracts named in the Act were all in the same condition at the date of the passing of the Act of 1869, so that what was good law for one was necessarily applicable to the others; if this had been so, the frame of the Act would have been different from what it is. If then it was uncertain whether the jurisdiction of this Court in the Cossyah Hills would ever be taken away at all, it cannot be held that it was actually taken away by the Supreme Legislature in the Act of 1869, and that all that was left to the Lieutenant-Governor was to make arrangements accordingly, and to fix a date for the commencement of the operation of the Act.

It is consequently necessary to ascertain whether the delegation of power to the Lieutenant-Governor to remove the Cossyah and Jynteeah Hills from the jurisdiction of this Court by a legislative declaration was within the powers of the Legislative Council. On this point, the language of section 22 of the Councils' Act appears to me to leave no doubt.

Power is given to the Governor-General in Council at meetings for the purpose of making laws and regulations to alter any laws and make laws for all persons, places and Courts of Justice in the Indian territories of Her Majesty: provided, *inter alia*, that such laws shall not in any way affect any of the provisions of the Councils' Act.

The law under consideration is a law made undoubtedly at a meeting of the Legislative Council of the Governor-General, and so far a good law; and if it does not fall within one of the seven exceptions specified in section 22, it has by the 45th section of 3 and 4 William IV, c. 85, all the force and effect of an Act of Parliament; but if it does fall within one of those exceptions, this last mentioned enactment gives it no force at all. Section 22 of the Councils' Act having been substituted for the earlier provisions on the same subject (3 and 4 Will. IV, c. 85, s. 43, as modified by 16 and 17 Vic. 95, s. 23), the words of section 45—"all laws and regulations made as aforesaid"—only apply to

laws properly made under section 22 of the Councils' Act, and not within one of the exceptions.

The Act of Parliament requires that, ordinarily, all laws shall be made only at a meeting of the Council of the Governor-General held for the sole purpose of making laws and regulations, and at which certain persons are present.

When laws are to be made otherwise, there is a specific provision according to the nature of the case, but these exceptional provisions are made by Parliament itself, and not left to the discretion of the Indian Legislature; and it is and has long been an established rule (section 70, 3 and 4 William IV, c. 85, and section 6, 24 and 25 Vic., c. 67) that the Governor-General himself shall not by himself, except when specially authorized by Parliament, exercise the power of making laws and regulations. It would not be possible for the Legislative Council validly to divest itself of its own functions and transfer them to the Governor-General alone. A law to such effect made by the Council would violate the provisions of both section 6 and section 15, whether that law purported to vest the Governor-General with legislative powers generally or specially, and would therefore, under the express words of section 22, be *ultra vires*. But if this is so as to the Governor-General, surely it must be so as to the Lieutenant-Governor of Bengal. The same reasons which apply in the one case for restraining the highest officer of the Crown in India from exercising legislative powers alone, and for entrusting those powers only to a Council to be exercised at a meeting at which not less than a certain number of members shall be present, must apply with more force to a subordinate officer; and section 15 is as much violated in one case as in the other.

Therefore, in my opinion, the conferring on the Lieutenant-Governor power to remove the Cossyah Hills from the jurisdiction of this Court was *ultra vires*.

If it was *ultra vires*, this Court is bound to take notice of the fact. The power formerly exercised by the Nizamut Adawlut in this tract of country was given to this Court by Act of Parliament (section 9, 24 and 25 Vic., c. 104); and unless it has been validly taken away, we are bound to exercise it.

No doubt, the Governor-General in Council, whatever construc-

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tion be put on the section referred to, has power to put an end to this Court's jurisdiction in this tract of country, but no other authority in India can do so. But if the Governor-General in Council wishes to do it, he must proceed by the exercise of his legislative powers as created or declared by the Councils' Act and in no other way. The High Courts' Act provides no new mode of legislation, but makes the jurisdiction of the High Courts subject to the legislative powers of the Governor-General in Council, which must be looked for elsewhere. If he shall proceed in any other way, this Court is constrained by the Act of Parliament to continue the exercise of its jurisdiction.

But it is said that this view of the provisions of section 22 of the Councils' Act is at variance with that taken through a long course of years, as shown by a series of enactments in which a somewhat similar mode of supplementing the action of the Legislative Council has been adopted.

I think it unnecessary now to express any opinion as to the validity of the Acts referred to. Assuming them to have been validly enacted, their existence does not support the argument that the mode of legislation adopted in Act XXII of 1869 is only that which has been constantly adopted without objection; and that as it cannot be assumed that this mode of legislation has escaped the observation of the Imperial Parliament, it has the warrant of a tacit approval.

It appears to me that a distinction must be drawn between provisions by which the carrying out of the declared decisions of the Supreme Legislature is furthered, and provisions which give a power to act independently of the discretion of the Council of the Governor-General. As an example of the former, I may take section 385 of Act VIII of 1859 or section 445 of Act XXV of 1861. These are laws intended to be eventually of universal application in British India (the latter re-enacted in Act X of 1872 is now, with very few exceptions, the only law on the subject); the actual introduction of these enactments was, in certain tracts of country, postponed and made to depend on the discretion of the Local Government. The Supreme Legislature had considered these laws and adopted them as laws to be eventually in force everywhere; but instead of declaring that they were to take effect

everywhere at once, it was content to declare the ultimate law and leave the Local Governments to advance up to this standard as fast as they conveniently could. When a Local Government declared such a law to be in force, it was merely parting with a power of delay conferred upon it; it did not make any law; the law introduced was the law made by the Governor-General in Council with the express intention that it should become the law of the particular tract of country in due time. But Act XXII of 1869 does not stand on precisely the same footing. There was no expression of a determination by or desire of the Legislative Council that eventually the Jynteah Hills, the Naga Hills, and the Cossyah Hills should be reduced to the same condition as the Garo Hills; at the most it can only be said that there was an expectation that such a measure might become necessary; but an attempt to provide beforehand for the contingency of such a state of things arising in the former, as then warranted the introduction of the measure into the Garo Hills, does not amount to a determination that this was the law which it was desirable to put into force in all these hill tracts; had this been the intention of the Legislature, I should have expected it to have been expressed in plain language.

The provisions of section 39, Act XXIII of 1861, do not affect my view of this matter. This section allows a Local Government with the previous sanction of the Governor-General in Council, to annex any restriction, limitation, or proviso it may think proper when extending the Code of Civil Procedure to any territory not subject to the general regulations; but this is merely another form of delaying the full extension of the Code. So far as the Code obtains operation, it is still—because the extension is—*pro tanto*, a carrying out of the intention of the superior Legislature that this shall be sooner or later the law in the particular tract of country. As I read the section, no power is given to amend the law itself: it is only a power to keep some portion in abeyance, or to make its operation contingent on something external to it, which again is only another form of postponing its full operation.

A very large number of the Acts referred to in the Schedule submitted to us of Acts containing delegation of powers is of the same character. The subject of many is limited, but the mode of legislation is substantially the same. The general law on each

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subject is propounded by the Legislature, the gradual application of it is entrusted to some authority named in the Act. In form it may be that the law is made for one or more named members of a class with power to extend to others; but, in effect, this is making a law for the class with a power granted to the Local Government to introduce it more or less rapidly as may seem fit. The distinctive feature, in my opinion, is that in each of these cases the law is constructive by addition to, or re-modelling of, the Statute law then existing as to each class of subjects under the directly exercised discretion of a legislative body; whereas Act XXII of 1869, as far as we are now concerned with it, is destructive, and operates merely to terminate the operation of established laws.

There is another class of Acts in which there is apparently a clear delegation of legislative power. I refer to Acts which contain a provision giving power to make rules or bye-laws and to impose taxes or fix fees and charges; but these are clearly distinguishable from such an Act as Act XXII of 1869, so far as we are concerned with it now, namely, so far as it gives power to the Lieutenant-Governor to repeal section 9 of 24 and 25 Vic., c. 104. Whether the powers conferred in these Acts to make rules and bye-laws can in all cases be defended is a matter I need not discuss.

All legislation of this class is subordinate to, and in furtherance of, the defined object of each particular Act.

The case of *Biddle vs. Tarriny Churn. Banerjee* (Taylor and Bell, page 409, and again at page 479) is authority for holding that, while the validity of rules, which can be brought within the definition of ministerial acts, is undoubted, the validity of other rules, such as therein mentioned, namely, rules imposing a penalty directly, or granting power of compelling discovery, is open to grave doubt, if indeed the case does not go so far as to rule that they are absolutely invalid. It is foreign to my present purpose to discuss that case; it is enough to show that the delegation relied on does not stand unquestioned, and that there is very high authority for doubting its validity.

As I have referred to this case, I take the opportunity of observing that it seems to me strongly to support the earlier part

of my judgment. At page 406 the learned Chief Justice, Sir LAWRENCE PEEL, observes :—

“The Legislature of India, though it possesses large legislative powers, is still a limited Legislature, and exercises a delegated authority of making laws. Independently of the territorial limits assigned to its power of making laws, there are other limits imposed which the Legislature, must not exceed; and it is the province of the Courts of Justice of the country to decide on the legality of Acts of the Legislature, if a suit be instituted to decide whether the Legislature has or has not exceeded the limits within which it may legislate.” Again, at page 479, as I understand the judgment, he assumes as undoubted that delegation of legislative authority by the Indian Legislature is beyond its powers, the question being in each case whether there has or has not been such delegation.

The Acts which are most analogous to the Act under consideration, so far as we have now to deal with it, are few in number; they have been termed deregulationizing Acts.

Act XXI of 1845 was passed while the 3 and 4 Will. IV, c. 85, was in force; the power of legislation was then vested in the Governor-General in Council. This Act does not make any transfer of that power, but simply declares that the same authority in which the legislative power rested, viz., Governor-General in Council, may by an order in Council do certain things. The same remarks apply to Acts VI and XI of 1846.

After the passing of 16 and 17 Vic., c. 95, we come to the Sonthal Districts' Act XXXVII of 1855. This differs in form from Act XXII of 1869, and is distinctly a legislative declaration by the Governor-General in Council. The Lieutenant-Governor has, by section 6, to give effect to it by proclamation, but this obviously is a merely administrative action. The power to allow an appeal in Clause 1, section 4, notwithstanding the declaration in that section that all decisions and sentences passed according to the provisions of the Act are final, is a power to relax the stringency of the Act in the direction of the general law.

The Chittagong Hill Tracts' Act XXII of 1860 approaches in some respects more nearly to the form of the Act under consideration. Whether any of its provisions are open to question is

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beyond the scope of my present enquiry. So far as the abolition of the jurisdiction of the Courts of Civil and Criminal Judicature is concerned, the direct and undoubted authority of the Governor-General in Council has been exercised. In the Rohilkund Act, XIV of 1861, there is a slight change of form. While the Supreme Legislature makes a direct declaration in respect of certain tracts specified in the Schedule, it gives power to the Lieutenant-Governor, North-Western Provinces, to define the portions of Pergunnahs Juspoor and Kashipore in the District of Moradabad, which are to be subject to the Act, but it does not give him power to include these Pergunnahs or not at his pleasure and at such time as he may think fit. There is no provision for more than one proclamation giving effect to the Act. This Act approaches to, but does not reach the form of, Act XXII of 1869.

Act XXIV of 1864 is wholly different; it validates rules previously made. As far as it empowers the Local Government to extend any regulation or Act then in force, it may be said to give legislative power; but this is not such a power as is now in question, and whether such powers have been rightly or wrongly given is a matter on which I express no opinion.

On the whole, then, I am of opinion that the jurisdiction of this Court in the Cossyah and Jynteeah Hills has not been validly taken away, and that we are bound to entertain the appeal.

MARKBY, J. MARKBY, J. :—

Two persons, Bura and Book Singh, have been convicted on a charge of murder by the Deputy Commissioner of the Cossyah and Jynteeah Hills and sentenced to death. The sentence was commuted to transportation for life by the Chief Commissioner of Assam on the 23rd April 1876.

On the 9th July 1876, the officer in charge of the Kamrup Jail forwarded to this Court petitions of appeal from these prisoners, unaccompanied by copies of the judgment.

The first question which arises in the case is, whether the High Court has any power to entertain these applications; and this question is one of so much importance that it has been referred to a Full Bench, and has been on two occasions very fully argued.

The Cossyah and Jynteeah Hills comprise a considerable tract of

country on the eastern frontiers of Bengal, and they contain a population which, in 1862, was estimated at 120,000. The Jynteeah Hills were formerly under the independent Rajah of Jynteeah. The Cossyah Hills were divided into a number of smaller districts, under different rulers. Of the twenty-five Cossyah states, five used commonly to be called "semi-independent," and the remaining twenty "dependent." It is not very clear how this division was arrived at, and it probably has never been accurately ascertained what part of the Cossyah Hills is, and what is not, British territory. But by far the greater portion has long been subject to our Government, and is therefore (21 and 22 Vic., c. 106, s. 1) included in British India.

Prior to 1854, there was a Political Agent of the Cossyah Hills, who exercised the usual powers of a Political Agent with regard to so much of the territory as was under chiefs who were treated as independent; but he also held general powers for the administration of justice in those portions of the territory which had ceased to be independent. Probably, in practice, the difference was of no very great importance, the chiefs being all too insignificant to assert any independent authority.

This officer was in command of the Sylhet Light Infantry, and he acted also as the Political Agent in respect of Jynteeah, which, up to the period of the Burmese War in 1824, was independent. During that war the Jynteeah territory was taken under the protection of the British, and the Rajah acknowledged his allegiance. In 1835, the reigning Rajah was deposed for an act of cruelty, and his territory was annexed. From the date of this annexation the Political Agent of the Cossyah Hills seems to have exercised the same functions with regard to Jynteeah as he had hitherto exercised in respect of the annexed portions of the Cossyah Hills. But he still continued to bear the somewhat inappropriate designation of Political Agent of the Cossyah Hills.

In the year 1835 an Act was passed (Act VI of 1835) by which the functionaries in political charge of the "Cossyah Hills" were placed under the control and superintendence, in criminal matters, of the Court of Nizamut Adawlut.

From the records of this Court it appears that, on the 16th June 1835, the Court informed the Government of Bengal that the

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Political Agent of the Cossyah Hills had submitted returns of criminal business for Jynteeah also. The Government replied that the Jynteeah territory was taken possession of on the 15th of March, whilst the Act was passed on the 13th, and that if the Court thought that this did not constitute any objection to their doing so, the Government saw no objection to the Court exercising jurisdiction in Jynteeah, which was accordingly authorised. The Court replied, accepting the jurisdiction in Jynteeah from the date of the Act.

The arrangement of the duties of the Political Agent of the Cossyah Hills remained, as above stated, until 1854, when an order was issued by the Governor of Bengal (1st March 1854) to the Commissioner of Assam, communicating his determination to separate the civil functions of the Political Agent in the Cossyah Hills from the command of the Sylhet Light Infantry, and to vest the former in an Assistant Commissioner, subordinate to the Commissioner of Assam, "precisely on the same footing as the other principal assistants in the Province of Assam." The order also intimates that the officer to be appointed would be called "Principal Assistant in charge of the Cossyah and Jynteeah Hills."

From that time the Cossyah and Jynteeah Hills, though never formally annexed to the district of Assam, seem to have been treated as part of Assam. All the criminal appeals which in Regulation Provinces would go to the Sessions Judge went to the Deputy Commissioner of Assam, and were apparently disposed of by him in the same manner as any other criminal appeals in Assam.

In the year 1862, the jurisdiction which had been exercised by the Nizamut Adawlut was transferred to the High Court upon its creation by Her Majesty's Letters Patent.

The Code of Criminal Procedure was extended to Assam by a notification of the Lieutenant-Governor of Bengal, published in the *Gazette* of 16th November 1862; and though never expressly extended (as far as I have discovered) to the Cossyah and Jynteeah Hills, it was considered to be in force in that district without any further notification; and this it would be if the view that this district was made a part of Assam were correct.

In the year 1866, the Assistant Commissioner convicted a prisoner, named U. Don Dolloi, of an offence under section 504

of the Indian Penal Code, and bound him over to keep the peace for one year after his release. On appeal to the Deputy Commissioner of the Cossyah and Jynteeah Hills, that officer confirmed the order; but this Court, upon a petition presented by the accused, altered the period for which the party was bound over.

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In the year 1869, the Deputy Commissioner of the Cossyah and Jynteeah Hills referred a sentence of death for confirmation by this Court under section 880 of the Code of Criminal Procedure. The sentence was confirmed, and the prisoner was hanged.

Under these circumstances there can be no doubt that this Court had at one time jurisdiction in the Cossyah and Jynteeah Hills. The only question therefore is, whether this jurisdiction has been taken away, and this renders it necessary to consider the recent legislation with regard to these districts.

By section 4 of Act XXII of 1869 (which is called the Garo Hills Act), the Garo Hills are removed "from the jurisdiction of the Courts of Civil and Criminal Judicature, and from the control of the offices of revenue constituted by the Regulations of the Bengal Code and the Acts passed by the Legislature now or heretofore established in British India, as well as from the law prescribed for the said Courts and offices by the Regulations and Acts aforesaid;" and it is provided that "no Act hereafter passed by the Council of the Governor-General for making laws and regulations shall be deemed to extend to any part of the said territory unless the same be specially named therein." By section 5 the administration of civil and criminal justice and the superintendence of the settlement and realization of the public revenue and of all matters relating to rent within the said territory, are vested in such officers as the said Lieutenant-Governor may, for the purpose of tribunals of first instance, or of reference and appeal, from time to time, appoint; and the officers so appointed are in the administration of justice to "be subject to the direction and control of the said Lieutenant-Governor, and be guided by such instructions as he may from time to time issue."

By section 9 the Lieutenant-Governor is empowered to extend, all or any of the provisions of this Act to the Cossyah and Jynteeah Hills.

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By a notification in the *Calcutta Gazette* of 14th October 1871, the Lieutenant-Governor did extend the provisions of this Act to the Cossyah and Jynteeah Hills, and he also directed that the Commissioner of Assam should exercise the powers of the High Court in the civil and criminal cases triable in the Courts of that district. On the 30th July 1872, rules were issued by the Lieutenant-Governor under sections 5 and 9 of Act XXII of 1869, for the administration of justice and Police in the Cossyah and Jynteeah Hills, in which no allusion is made to the High Court.

Shortly after this, another power, which had been conferred by Parliament upon the Governor-General in Council, was called into action with reference to these districts.

By proclamation of the 6th February 1874 (see *Gazette of India* of 7th February), in exercise of the powers conferred by Section 3 of Statutes 17 and 18 Vic., c. 77, the Governor-General in Council took some districts (now forming "Assam" and including the Cossyah and Jynteeah Hills) under his immediate authority and management, which districts were till then under the Lieutenant-Governor of Bengal.

On the same day, by another proclamation, the Governor-General in Council constituted Assam a Chief Commissionership.

By Act VIII of 1874, after a recital that the Cossyah and Jynteeah Hills had been taken under the direct management of the Governor-General in Council, and had been made part of the Chief Commissionership of Assam, all the powers then vested in the Lieutenant-Governor of Bengal were (section 1) transferred to the Governor-General in Council, and the Governor-General in Council was empowered (section 2) to delegate to the Chief Commissioner all or any of the said powers, or to withdraw the said powers.

By Act XIV of 1874, in which the Cossyah and Jynteeah Hills are specially named, Act XXII of 1869 is repealed, and the Local Government is empowered (section 6) to appoint officers to administer criminal and civil justice, and to regulate the procedure of officers so appointed, but not so as to restrict the operation of any enactment for the time being in force in any of the said

districts. And it is also declared (section 7) that all rules theretofore prescribed for the guidance of officers "for all or any of the purposes mentioned in section 6 and in force at the time of the passing of this Act shall continue to be in force unless and until otherwise directed." This Act, however, has not yet come into force in those hills, because as yet no notification under section 3 has been published.

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By Notification of the 16th April 1874 (see *Gazette of India*, April 18th), the Governor-General in Council, under section 5 of Act XXII of 1869, made certain alterations in the rules for the Cossyah and Jynteeah Hills published under the Notification of July 30th, 1872, by the Lieutenant-Governor of Bengal, and republished the rules. In these rules no mention is made of the High Court.

It thus appears that the jurisdiction of the High Court was certainly in existence until the passing of Act XXII of 1869. The question then is, has this jurisdiction ceased by reason of that Act or by reason of anything done by any person under that Act?

For the prisoners it is contended (1) that the jurisdiction of the High Court, as established by Parliament, cannot be wholly abolished by any authority in this country whatsoever; and (2) that if there be any authority which can abolish the jurisdiction of the High Court, it is only the Governor-General in Council exercising legislative powers at a meeting for the purpose of making laws and regulations which can do this; and that in this case the assumed abolition was not by this authority but by the Lieutenant-Governor of Bengal acting under the powers given to him by Act XXII of 1869, which powers, it is contended, were not validly conferred.

With regard to the first question, the jurisdiction of this Court in the Cossyah and Jynteeah Hills was a jurisdiction vested in the Nizamut Adawlut at the time of its abolition, and it thus falls within the 2nd Clause of section 9 of the 24 and 25 Vic., c. 104. It is, therefore, in my opinion expressly made subject by that clause to the legislative powers of the Governor-General of India in Council, or (to use a phrase which is more convenient) to the Legislative Council of India.



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I have given fully my reasons for this construction of the High Courts' Act in the case of the petition of Syed Feda Hossein, Indian Law Reports, Vol. I, page 431 (Calcutta Series), to which reasons I still adhere, and in which I understand the other members of the Full Bench substantially concur.

It is necessary, therefore, to consider the second objection taken on behalf of the prisoner. This objection is met by the Crown in three different ways: First, it is said that the Act of 1869 does itself actually take away the jurisdiction of this Court; secondly, that even it does not do so, it evinces a final determination of the legislative authority that this jurisdiction shall be taken away, and that it only leaves to the Lieutenant-Governor to fix the exact date of the Act coming into operation—no discretion being vested in him as to whether the Act shall come into operation or not; thirdly, that even if the Lieutenant-Governor be vested with a discretion to determine whether or no the jurisdiction of this Court shall be taken away, still there is nothing which renders such a delegation of authority illegal.

The first and second of the three propositions put forward on the part of the Crown depend upon what is the true construction of Act XXII of 1869. The Act is a very peculiar one. It recites that "it is expedient to remove the Garo Hills from the jurisdiction of the Civil, Criminal, and Revenue Courts and offices established under the General Regulations and Acts, and to provide for the administration of justice and the collection of revenue in the said territory." The Act is to be called "The Garo Hill's Act, 1869," and it is to come into operation "on such day as the Lieutenant-Governor of Bengal shall by notification in the *Calcutta Gazette* direct." Then by section 3 "on and after such day," that is to say, when the Act comes into operation in the Garo Hills, Act VI of 1835, so far as it relates to the Cossyah Hills, is to be repealed. Then sections 4 to 8 deal exclusively with the Garo Hills, and section 9 gives the power already adverted to, to extend all or any of the provisions of the Act to the Jynteeah Hills, the Naga Hills, and to such portion of the Cossyah Hills as for the time being forms part of British India. It is contended that section 3, which relates to the repeal of Act VI of 1835, came into operation so far as regards the Cossyah.

Hills when the Lieutenant-Governor brought the Act into operation in the Garo Hills; that there was no discretion left as to bringing the Act into operation in the Garo Hills, and that by the repeal of Act VI of 1835 the jurisdiction of this Court, as created by that Act, was destroyed. Assuming, for the present, the correctness of the other parts of this argument, still, in my opinion, the last proposition is incorrect. When Act XXII of 1869 was passed, the jurisdiction of this Court in the Cossyah Hills in no wise depended upon Act VI of 1835. It depended upon the 24th and 25th Vic., c. 104, s. 9. Act VI of 1835, in so far as it conferred jurisdiction upon this Court, was wholly obsolete. Moreover, as already shown, the jurisdiction of the Nizamut Adawlut was, after some discussion, extended to both the Cossyah and Jynteeah Hills, and the jurisdiction of the High Court, which is co-extensive, has been exercised in both tracts accordingly. But section 3 of Act XXII of 1869 is expressly confined to the Cossyah Hills. The result, therefore, of this construction of Act XXII of 1869 would be that, whilst it takes away our jurisdiction in the Cossyah Hills, it leaves it in Jynteeah Hills. This is very improbable. Ever since the year 1835, both these tracts have been under one administration forming the district of one Deputy Commissioner. The reason why the Legislature was desirous to get rid of the Act of 1835 at all events is not perhaps at first sight quite obvious. But it was, I believe, as follows: As to that large portion of the Cossyah Hills, which lies within British territory, the Act was, as I have said before, obsolete. As to any small portion of the Cossyah Hills, if there should be any, which might be considered as not within British territory, the Act, though in terms applicable thereto, could not be enforced. It was, therefore, an Act which it was proper to repeal so far as the Cossyah Hills were concerned, whether our jurisdiction remained or not. I am, therefore, clearly of opinion, notwithstanding the reference to the Cossyah Hills in section 3, and the repeal of Act of VI of 1835, that the Act of 1869 does not itself take away the jurisdiction of the High Court either in the Cossyah or in the Jynteeah Hills.

Nor do I think that the Act, taken as a whole, evinces a final determination on the part of the Legislature that the jurisdiction

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of the High Court shall be taken away. I will assume that, if it did so, there would be then nothing to prevent the operation of the Act. I will assume that the operation of an Act, complete in all its parts, may be suspended by the Legislature until something is done by an officer of Government. This might be considered merely as a method of promulgation, and not as any delegation of authority at all. It would be the same as if the Act had been directed to come into operation on its being printed at length in the *Calcutta Gazette*. If, therefore, this be the true construction of the Act, I am not prepared, as at present advised, to say that it could not operate. As regards the Garo Hills, the Act (always, excepting section 8 which presents special difficulties of its own which I need not now consider) may I think bear this construction. But as regards the Cossyah and Jynteeah Hills, the Act cannot, I think, be so construed. The frame of the Act as to the Garo Hills and as to the Cossyah and Jynteeah Hills is entirely different. If the Legislature had had the same final intentions as to removing the Cossyah and Jynteeah Hills from the jurisdiction of the ordinary Courts as it may, I think, notwithstanding section 2, be considered to have had in respect of the Garo Hills, the preamble of the Act would not have been limited to declaring the expediency of removing the Garo Hills only from the jurisdiction of those Courts. It would have declared the expediency of removing the Cossyah and Jynteeah Hills also. It is true that the preamble of an Act cannot limit the express words. But here the express words are in accordance with the preamble. The power to bring the Act into operation generally is conferred by section 2. The power to extend the Act to the Cossyah and Jynteeah Hills is given quite separately and in different language by section 9; and it is not a power to extend the Act simply, but to extend "all or any" of the provisions of the Act. The Lieutenant-Governor might for example have applied sections 6 and 7 to the Cossyah and Jynteeah Hills, but not section 4, in which case our jurisdiction would have remained as before. It cannot, I think, be said that a power of extension, so conferred, makes the Lieutenant-Governor the mere ministerial officer who is to promulgate the Act. It vests in the Lieutenant-Governor a double discretion: First, whether

the Act shall come into operation in the Cossyah and Jynteeah Hills at all ; and, secondly, if so, what portion of it shall there operate. I do not mean to say that this is all the discretion vested by the Act in the Lieutenant-Governor. He may by section 8 apply or not apply to these territories all or any portion of any law applicable to other parts of Bengal. But this portion of the Act is not now immediately before us. I am at present only considering section 9, and what discretion that section leaves to the Lieutenant-Governor as to the application to the Cossyah and Jynteeah Hills of section 4. Reading section 9 by itself, the discretion appears to me to be absolute. Reading the whole Act I can find no words which can carry any further inference than this—that the Legislative Council, when it determined it to be expedient to remove the Garo Hills from the jurisdiction of the ordinary Courts, at the same time contemplated the possibility of its being expedient to remove the Cossyah and Jynteeah Hills from this jurisdiction also. But this they left an entirely open question to be decided by the Lieutenant-Governor of Bengal.

It is not of course in any way necessary now to establish that there is no legislative discretion left to the Lieutenant-Governor as to the application of this Act to the Garo Hills. But it is, I think, desirable to show that the discretion (if any) under section 2, and the discretion under section 9, are wholly different both in kind and degree. For this purpose we may consider the matter in this way. It is just possible to conceive that the Lieutenant-Governor of Bengal might not choose to issue the notification under section 2, and that the Governor-General in Council might not choose to compel him to do so. The Legislature would then have been helpless ; the Act would never come into operation at all ; it would have wholly miscarried ; and the intention of the Legislature would have been defeated. But would the intention of the Legislature have been defeated if the Lieutenant-Governor had given the notification under section 2, and had not extended section 4 of the Act to the Cossyah and Jynteeah Hills ? I think not. In the one case the Legislature counted on the action of the Lieutenant-Governor as a certainty ; in the other case

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they left him to act or not as he pleased. Then, again, the moment the Act came into operation by the issuing of the notification under section 2, the jurisdiction of the ordinary Courts in the Garo Hills was destroyed by the imperative words of section 4. But even when the Act had been thus brought into operation there is still not a single imperative word applicable to the Cossyah and Jynteeah Hills at all. Even then it is only said that the Lieutenant-Governor "may from time to time extend" to certain districts "all or any of the provisions of the Act." What ground is there for saying that the intention of the Legislature would have been defeated if the Lieutenant-Governor had declined to exercise any portion of these powers?

Another way of looking at section 9 was suggested in the course of the argument. It was said that section 9 might be looked at merely as dealing with a question of boundaries; that all the districts mentioned in the Act, the Garo Hills, the Cossyah and the Jynteeah Hills, and the Naga Hills, were conterminous, and that in such wild and barbarous districts as these, it would be impossible for the Legislature to fix the exact limits of the application of the Act. I think this suggestion does not accord with either the geographical or the historical facts. Although the Garo Hills, and the Cossyah and Jynteeah Hills, and the Naga Hills are contiguous, they are three entirely separate districts. The Garo Hills belong to the Commissionership of Cooch Behar, the Cossyah and Jynteeah Hills, and the Naga Hills to the Commissionership of Assam. The boundary between the Garo Hills, the Cossyah and Jynteeah Hills, and the Naga Hills is generally well-defined. In point of size the three districts are about equal, the Cossyah and Jynteeah Hills being rather the largest. The policy of the Government has always been to keep the Garo Hills out of the jurisdiction of the regular Courts, and these Courts have never established their jurisdiction in that district. On the other hand, the policy as to the Cossyah and Jynteeah Hills was to bring them under the ordinary jurisdiction of the Courts; and this jurisdiction was fully established, and in action without inconvenience from 1835 up to 1871. The Garos are said to be wild and barbarous tribes whom

the Government in 1869 were still endeavouring to reclaim to the habits of civilized life. No such assertion, as far as I am aware, could be made with regard to the inhabitants of the Cossyah and Jynteeah Hills. The district is a peaceable one; the inhabitants of it carry on peaceful pursuits. There are within it two considerable European stations, one of which is the seat of the Local Government of Assam. There are also many Europeans living in the Cossyah and Jynteeah Hills, most of them in the service of Government, but some are settlers. The determination, therefore, to exclude the ordinary Courts of Law from the Garo Hills would depend upon considerations having no application whatever, or at least only a very modified application to the Cossyah and Jynteeah Hills. Moreover, there was a special cause which led to the legislation of 1869 as regards the Garo Hills. There had been a decision of this Court which in effect decided that the Government had been wrong in treating certain portions of the Garo Hills as not within the jurisdiction of the ordinary Courts of Justice. It was to counteract the result of this decision that the Act of 1869 was passed. It was in effect an Act passed to legalize the *status quo*. But the same Act when introduced into the Cossyah and Jynteeah Hills, instead of continuing a state of things already in existence, entirely revolutionized the long established administration of the district. It threw back people who had been living for 35 years under a regular and settled administration according to established laws into a condition which every one would acknowledge to be only suitable to a people just emerging from barbarism, that is to say, a condition in which all the powers of Government were centred in the hands of a single individual. This may have been necessary. I do not presume to say that it was not so. But there is nothing in the frame of the Act of 1869, or the circumstances of the case, which would lead me to suppose that, simply because this was done in the Garo Hills, it was necessarily intended to be done in the Cossyah and Jynteeah Hills also.

I think, therefore, that the Legislature did not decide by Act XXII of 1869 that in the Cossyah and Jynteeah Hills the jurisdiction of the ordinary Courts should be excluded; that it did not express any opinion whatsoever upon that question, but that

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it left the decision of it to the absolute and uncontrolled discretion of the Lieutenant-Governor.

This being the view that I take of Act XXII of 1869, it becomes necessary to consider whether it falls within the legislative powers of the Governor-General of India in Council to delegate to the Lieutenant-Governor of Bengal the power of determining whether or no a particular district of British India shall remain subject to the jurisdiction of the High Court.

Now, in order to ascertain this, we must go back to that which is the root of the whole matter, the 24 and 25 Vic., c. 104, s. 9, which (as we are all agreed) alone makes the High Court subject to any legislative control in this country, and the question comes to this: When Parliament made the High Court subject to this legislative control, did it hereby intend to enable the Indian Legislative Council to transfer that control to another person, or did Parliament intend that that control should be exercised by the Legislative Council of India itself?

The argument that such a transfer of authority may take place has been put, by at least one of the learned Counsel who argued this case for the Crown, on very high grounds. It is said that the legislative powers of the Governor-General of India in Council mentioned in section 9 of the 24 and 25 Vic., c. 104, are those legislative powers which are conferred by the Councils' Act (24 and 25 Vic., c. 67); that, except as regards the seven heads specifically mentioned in section 22 of the latter Act, the Indian Legislature has a power co-equal with that of Parliament; that there is no restriction as to the mode of legislation; that the power of the Indian Legislature to delegate its authority is no more to be questioned than the power of Parliament to do the same; and that every possible and imaginable power of Parliament not specially excepted in the Councils' Act is conferred. Stress was also laid on section 45 of 3 and 4 Will. IV, c. 85, which provides that laws made by the Indian Legislature shall have the same force as an Act of Parliament.

This question, although not, as I shall hereafter show, devoid of authority, has never been discussed at length, as far as I am aware, by any English Judges. The task of laying down the principles upon which such a high and important question is to be deter-

mined is an extremely difficult one, and I approach it with the greatest diffidence. But it is nevertheless one which in the present case I am bound to attempt.

Before proceeding to consider the general question, I will consider an argument which was addressed to us in order to show that the Courts of Law have no jurisdiction to enter upon a consideration of this question at all. It was said that, if there be any limits to the legislative powers of the Governor-General in Council, they are political limits and not legal ones, and that the question I am about to consider is a political one upon which Courts of Law are not empowered to enter. All doubt upon this part of the case may, I think, be cleared up by a consideration of the difference between a sovereign or supreme, and a subordinate or restricted, Legislature. No one would contend that the Indian Legislature is itself sovereign. It exercises sovereign powers, but by delegation only, and is subordinate to Parliament. This is made clear by the 3 and 4 Will. IV, c. 85, s. 51, which is applicable to the present Legislative Council (see 24 and 25 Vic., c. 67, s. 2), and which reserves to Parliament the full power still to legislate for India, and to "control, supervise, and prevent all proceedings and Acts whatsoever of the Governor-General in Council." And it is well known that Parliament does exercise a control as regards the affairs of India which it does not exercise in any other dependency of the British Crown. The Indian budget is annually laid before Parliament. Indian questions are frequently there debated on; and enquiries are constantly being there made by committees and otherwise into the conduct of affairs by the Government of this country. Now, the reasons why Courts of Law cannot examine the validity of Acts passed by a sovereign or supreme Legislature have no application whatsoever to the Acts of a subordinate or restricted Legislature. Of course, within its competency, the Acts of a subordinate or restricted Legislature are, to use the expression of Chancellor Kent, "as absolute and uncontrollable as laws flowing from the sovereign power" (Kent Com., p. 448); and I may remark in passing that this explains how it is that the Acts of the Indian Legislature, if duly authorized, come to be equivalent to Acts of Parliament. But the question whether the Act is or is not within the compe-

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tency of the Legislature must, as the same learned author points out, of necessity fall within the province of Courts of Law to determine. The same principle was laid down by the Supreme Court of the United States in a case quoted by Chancellor Kent at page 453. There the Chief Justice points out that the powers of the Legislature are in America (as they are in India) defined and limited by a written constitution; "but," he proceeds to say, "to what purpose is that limitation if those limits may at any time be passed? The distinction between a Government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if Acts prohibited and Acts allowed are of equal obligation. \* \* \*

\* \* \* The theory of every Government with a written constitution forming the fundamental and paramount law of the nation must be that an Act of the Legislature repugnant to the constitution is void. If void, it cannot bind the Courts, and oblige them to give it effect, for this would be to overthrow in fact what was established in theory, and to make that operative in law which was not law. \* \* \* If the constitution be superior to an Act of the Legislature, the Courts must decide between these conflicting rules; and how can they close their eyes on the constitution and see only the law." In order properly to understand these observations and to apply them to the present case, it must be borne in mind that the words "constitution" and "constitutional," as here used, do not mean precisely the same thing as with us, and the distinction is most important, as upon its due observance depend the exact limits of the competency of Courts of Law to enquire into the validity of the Act of a subordinate Legislature. The Parliament of England, although absolutely sovereign and supreme, is restricted by limits which are called constitutional, and we speak of certain principles of the English constitution as being inviolable. But Parliament, being in the eye of the law absolute, can do that which a subordinate Legislature cannot do. It can, in the eye of the law, by its own ordinary proceedings, alter the constitution. The proceedings, therefore, of Parliament can never be questioned upon constitutional grounds by Courts of Law. The constitutional restriction has, *ex hypothesi*, been already cut away by paramount

authority before the question arises. But not so where there is a written constitution issuing from an authority superior to that of the Legislature whose functions it defines. There the constitutional restrictions always operate until the superior authority has removed them, and the Courts of Law are bound to give effect to them. Moreover—which is most important, as showing that the question to be decided is, in the strict sense of the word, a legal and not a political one—the restrictions here, as in America, exist in a written form, so that the only question the Court has to determine is the ordinary one: What was the intention of the sovereign power when it created the subordinate Legislature? I desire it to be fully and clearly understood that I treat this as an ordinary question of construction of an Act or Acts of Parliament, and I do not intend to enter into any political considerations whatsoever.

I also desire to say that I in no way countenance the doctrine which has been put forward by some eminent authorities, but which I believe to be now exploded, that Courts of Law can question the validity of Acts of the Legislature upon general considerations of religion, morality, natural justice, the so-called social contract, or other similar grounds. I have repudiated this doctrine already in the case of *The Queen vs. Ameer Khan*, 6 B. L. R., 482, and I do so again. Where an Act has once been passed by a Legislature which is supreme, I consider it to be absolutely binding upon Courts of Law. Where it is passed by a Legislature, the powers of which are limited, it is not the less binding, provided it be not in excess of the powers conferred upon the limited Legislature. I may seem to some persons to be here repeating mere truisms, but I know by experience how much one is liable to be misunderstood when speaking upon such subjects as these.

Being, therefore, of opinion that it is not only within our power, but that it is our duty to say whether the authority given to the Lieutenant-Governor to take away the jurisdiction of this Court was validly conferred, I proceed to consider the general and important question, whether the Councils' Act enables the Legislative Council of India to transfer to others the powers which Parliament has conferred upon itself.

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Now, what is the broad principle generally applicable to all cases where an authority is given to one person to do acts on behalf of another, which authority involves personal trust and confidence in the agent, and is to be exercised by him in a particular manner? It will, I think, be admitted that the agent is bound himself to perform the acts for which he is authorized according to the manner indicated; and that he cannot transfer to others the confidence reposed in himself. No doubt, this principle has been generally laid down with reference to dealings between private individuals, but it appears to me to be equally applicable to the case of public functionaries. Parliament has said that the Governor-General of India, together with certain other specified persons, whose qualifications are mentioned, may make, at meetings duly constituted laws for the people of India. To that extent it has delegated its own sovereign authority to the Indian Legislature. But, undoubtedly, this delegation of authority was made in view of the special qualifications of the persons in whom this power is reposed, and of the safe-guards which arise from the publicity and deliberation of the proceedings of a legislative body which can only transact business at meetings duly convened and constituted. Did Parliament intend to be itself the sole judge of what persons were thus qualified, and what safe-guards were necessary for that purpose, or did it intend to leave to the Legislature here the power to substitute any persons whom they might consider sufficiently well-qualified and any safe-guards which they might consider sufficiently effectual? That is the question we have to decide.

The only ground upon which, as it appears to me, it can be maintained that the Indian Legislative Council may transfer to others the powers entrusted to itself is the broad and general ground upon which it was placed by the learned Standing Counsel, Mr. Kennedy, who argued with great force and ability that the power to do this is involved in the power to make laws. It was pointed out that there is a difference between a general power to make laws, and a particular power, for example, to grant a lease or to execute a deed. If I give a man a power to execute a deed, and he transfers that power to some one else, he has done something clearly not authorized by the power which was restricted to the single act of executing a deed. But where Parliament has con-

ferred upon a Legislature the general power to make laws, the only question can be : Is the disputed Act a law ? If it is, then it is valid, unless it falls within some prohibition. I think that this argument is sound, and that it must be met if the validity of Act XXII of 1869 is denied.

Now, first, as to this Act being a law, I am clearly of opinion that it is not a law in the proper sense of the word. I am at present only speaking of the Act so far as the Cossyah and Jynteah Hills are concerned. As to those hills, in the view that I take of it, this Act commands no one to do or to forbear from doing anything. It is simply a signification that a particular person may in those hills either do or not do certain things as he likes. That is not a law in the ordinary acceptance of the word. I will not take the definition of law as given by so accurate and precise a writer as Austin, since it may perhaps be objected that his views cannot be applied to British Acts of Parliament. But no one will make this objection as regards Blackstone, and how do we find that Blackstone defines a law ? He says a law "is that rule of action which is prescribed by some superior, and which the inferior is bound to obey" (Vol. 1, p. 33). Tried by this test, Act XXII of 1869 is not a law. I need not here advert to the distinction between substantive and adjective law, the ultimate object of both being the same ; nor do I say that amongst the multitudinous varieties of meaning which have been attributed to the term law, a mere permission to legislate could never be called a law. Any authoritative expression of intention might, by some persons under some circumstances, be called a law. But when a Legislative Council was constituted in India distinct from the Executive Council, with power to make laws at meetings held for the purpose, I think it was clearly intended to restrict the Legislative Council to the exercise of functions which are properly legislative, that is, to the making of laws which (to use Blackstone's expression) are rules of action prescribed by a superior to an inferior, or of laws made in furtherance of these rules. The English Parliament is not so restricted. It is not only a legislative but a paramount sovereign body, and many of its Acts are not laws according to Blackstone's definition, though as being authoritative expressions of

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intention they might be sometimes so called. The Indian Legislative Council cannot, in my opinion, do all that Parliament can do, even where there is no express prohibition. The powers concentrated in Parliament are in India divided between the Executive and the Legislative Council. The Executive Council alone has the superintendence, direction, and control of the whole civil and military government of the territories and revenue of India 3 and 4 Will. IV, (c. 85, s. 39). The Legislative Council has the power of making laws only. In England also no doubt, as in India, the executive functions of Government are generally exercised by a body distinct from Parliament, by what (in a special sense) is called "the Government," but there is no *legal* impediment to Parliament taking upon itself executive functions, and the executive authorities are all responsible to Parliament for the way in which they exercise their executive powers. Indeed, to some extent, Parliament does exercise purely executive functions, as, for example, when it fixes the amount of the naval and military forces, or appropriates the public revenues. The difference in India is this: That the Executive Council and the Legislative Council are two co-ordinate and independent bodies, each having its own separate functions with which the other cannot legally interfere. For these reasons, I think that the Legislative Council, when it merely grants permission to another person to legislate, does not make a law within the meaning of the Act from which it derives its authority.

I have discussed this question with reference only to the word "laws." The Act of Parliament uses the expression "laws and regulations." No reliance was placed in the argument on the use of the additional word, and I think myself that it is merely redundant.

But I quite admit that in order fully to appreciate the powers of the Indian Legislature, we must not fasten our attention solely upon the meaning of a single word. We must look to the whole Act and gather from it what were the intentions of Parliament in this respect. Indeed, we must look further. In order properly to understand the frame and intention of the Councils' Act, we must consider the whole action of Parliament with regard to legislation in India from the year 1833 down to the present

time. In the year 1833, by the 3 and 4 Will. IV, c. 85, s. 43, the Governor-General in Council was empowered to make laws and regulations. Under this Act there was but one authority in India, "The Governor-General of India in Council." There was not as now a separate Council for making laws and regulations. But by section 48 all laws and regulations were to be made at some meeting of the Council at which the Governor-General and at least three of the ordinary members of Council were assembled; and at which alone the legal member of Council (as he was called) was entitled to vote. By section 70, the Governor-General in Council was expressly permitted to authorize the Governor-General alone to exercise all the powers which might be exercised by the Governor-General in Council, except the power of making laws and regulations.

From this time nothing occurred, as far as I am aware, to affect the constitution of the legislative authority in India, until the year 1853, when by the 16 and 17 Vic., c. 95, the constitution of the Legislative Council was entirely altered by the addition of members who did not belong to the Executive Council. A distinction between the legislative and executive functions of Government is observable in the Act of Will. IV, but this Act puts the distinctions upon much clearer ground. It puts those functions into the hands of two separate bodies. Owing to the power which the Executive Government has over the appointment of members, and for other reasons, its influence in the Legislative Council is still supreme. But the change in the constitution of the Legislative Council introduced by this Act is nevertheless of importance as emphasizing the distinction between legislative and executive functions. There is also no doubt that henceforth a conflict of opinion between the Executive and Legislative Councils was theoretically, at any rate, no longer impossible.

In the next year, Parliament, by the 17 and 18 Vic., c. 77, granted to the Executive Council power to take any district under its own immediate authority, and to give all necessary directions respecting the administration of such districts, or otherwise to provide for the administration thereof: provided always that no law or regulation should be altered, except by law

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made by the Legislative Council. This power to issue orders and directions is no doubt to some extent a legislative power, and the Act shows how very cautiously provision was made by Parliament for a change in the legislative machinery in India. It is to be observed also that this very limited power is conferred not upon the Legislative Council but upon the Executive—a peculiarity which, as we shall see, is preserved through all the Acts of Parliament relating to this subject.

The next Act is the Councils' Act. That Act re-confers the general power of making laws and regulations for the whole of India upon a Legislative Council somewhat differently constituted from what it had been previously, but which is to be quite distinct from the Executive Council. The Act provides how the members of the Legislative Council are to be appointed; how they are to resign their offices; and, for the validity of Acts, notwithstanding certain defects in the constitution of the Council; it declares that the power of making laws shall be exercised by the Council only at meetings duly constituted in the manner directed by the Act; it provides how meetings of the Council are to be convened and adjourned, and how rules for the conduct of business are to be made; and one important rule for the conduct of business is, by section 19, laid down by Parliament itself. It is also remarkable that the Indian Legislature does not exercise absolute control over the rules for the conduct of its own business, nor any control over its own adjournments; the first is partly, and the second entirely, under the control of the Executive Government. The Act also confers a somewhat more restricted, but still, as far as it goes, general legislative authority upon local Councils in Madras and Bombay. Then, dealing with the subject of a change in the legislative machinery, the Act empowers the Governor-General in Council, that is, the Executive Council, by proclamation to establish local Legislative Councils in other parts of India, each of which would possess, in regard to its own particular district, a general power to make laws similar to that possessed by the local Councils established by the Act. Thus we find provision in the Act for the establishment and constitution of, and the conduct of business by, three Legislative Councils. We also find power to create new local Councils given to the Executive;

and it is also provided how these local Councils are to be constituted, and how they are to conduct their business. As to any other changes in the legislative machinery, the Act is wholly silent.

The next Act is the 33 Vic., c. 8, expressly passed to make better provision for ordinary laws in certain parts of India. It was found, no doubt, that the machinery of even a local Legislature was too cumbrous for certain outlying districts, and this Act accordingly enables the Executive Government, under certain special restrictions, to make regulations (the word "laws" is not used) in a particular manner without any resort to the Legislative Council. But this can only be done in those parts of India to which the Secretary of State in Council shall declare the provisions of the Act applicable. In short, the Act provides a very special and guarded method of doing that which it is now said that the Indian Legislature may do without limit or restriction.

We see, therefore, that these Acts of Parliament nowhere confer any express power upon the Indian Legislature to change the machinery of legislation in India, but they do confer that power subject to important restrictions upon the Executive Government. Now Parliament, in conferring this power upon the Executive Government, necessarily proceeded upon one of two views. Either it considered that the Indian Legislature had power to change the machinery of legislation in India, or it considered that it had no such power. In other words, Parliament, when these Acts were passed, either considered that it was making the sole and only provisions which existed for changing the legislative machinery in India, or it considered that it was conferring powers which need only be resorted to when the Executive Government could not obtain the powers which it required from the Legislative Council. I have come to the conclusion upon reading these Acts of Parliament that Parliament considered itself to be making the only provisions which existed for changing the machinery of legislation otherwise than by an Act passed by itself. In the first place, whatever theoretical difficulty might be imagined as arising out of a conflict between the Executive and Legislative Councils, I do not think that any one ever seri-

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ously contemplated that any such difficulty could occur. The existence of the Legislative Council secures publicity and deliberation in regard to the legislative action of Government. But the actual power of Government still remains for all practical purposes with the Executive. I do not think, for example, that Parliament passed such an Act as the 33 Vic., c. 3, merely in view of such a contingency as a conflict between the Executive and the Legislative Council. In the next place, though it is not impossible, I think it unlikely that powers to make fundamental changes in the constitution would have been placed by Parliament simultaneously in the hands of two co-ordinate and independent bodies. In case of these two bodies working harmoniously, such a double power would be useless. In case of their working inharmoniously, such a double power would, as it seems to me, be objectionable. The very fact, therefore, that Parliament bestowed this power on the Executive Government of India seems to me to show that it did not already exist in the Legislature. But after all, what is most important, I cannot reconcile the language of these Acts of Parliament with the existence of the power now claimed for the Legislative Council of India. We must consider what the nature of the claim really is. It is nothing less than this : That the constitution of India, as created by Parliament in these Statutes, is a merely provisional one ; that all the directions as to the mode of exercising legislative authority are only to remain in force and effect so long as the Legislature may choose that they should do so ; that the separation which these Statutes make between the exercise of legislative and executive functions may be nullified ; and all the powers now held by the Legislature may be re-transferred to any executive officer it may select, whenever it pleases to do so. The Legislature may, indeed, still continue to exist, but it may abrogate all its functions by transferring them to some one else. I do not so read these Acts of Parliament. I think that Parliament intended the provisions which it made for the exercise of legislative power in India to be permanent until altered by itself, and that it did not intend to give the Indian Legislature power to repeal them. It may be that there is not much in India to which the term "constitution" can be properly applied. But

there is something. The laws must now be made publicly and with deliberation. I do not think this provision either worthless or unimportant, and its worth and importance is greatly increased by the fact that it is the only protection which exists in this country against hasty and arbitrary legislation. The Counsel for the Crown argue that this protection may be swept away by the Indian Legislature, and its powers of legislation placed in the hands of a single individual. I do not think so. I think this protection was provided by Parliament for the people of India, and that it is only under the express authority of Parliament itself that they can be deprived of it.

Moreover, if we consider at one view the Acts of Parliament which have been passed during the last forty years, we cannot help seeing that there has been a considerable conflict of principles in dealing with Indian legislation. At one time there was an attempt to place the legislative authority for the whole of India in a single Council. This authority has been in part decentralized by the establishment of local Councils and, from time to time, in respect of certain districts, the legislative authority, after having been once separated from the executive, has been, under the express authority of Parliament, again confounded with it, and all powers without distinction have been again placed in the hands of the Executive Government, where they originally resided. I believe that there is no doubt what the origin of this conflict and of these changes was. Whilst it was considered desirable to secure for the people of India that the functions of legislation should be separated from the other functions of Government and should be performed with publicity and deliberation, it was found impossible that this should be done by a single Council, or even, entirely so, by a general Council with the assistance of several local Councils. Parliament has therefore from time to time relieved these bodies from the pressure of an extreme difficulty. We even know that to avoid the slow and tedious method of regular legislation, the executive authorities did, in former times, assume the power to legislate otherwise than in the regular manner for certain districts of India. This was done to a large extent in the Non-Regulation Provinces. But in the whole course of the controversy which has thus arisen, and

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the pressure thus felt, I have never seen the claim distinctly put forward, that the right to change the legislative machinery in India was included within the general power to make laws, and was one which Parliament had entrusted to the discretion of Indian Legislative Councils. As far as I am aware, this easy and simple solution of the difficulty, namely, that these bodies have the general power to transfer their legislative authority to others, has never before been asserted; and no direct attempt to change the machinery of legislation in India by any Indian Legislative Council has ever yet been made.

Upon the whole, therefore, it seems to me that the fair and reasonable conclusion is this: That Parliament has provided for the exercise of the legislative authority in India by certain Councils at meetings duly constituted; further that, if any change in the legislative machinery is necessary, Parliament has provided how and by whom that change is to be made; that the power to make this change is vested by Parliament in the Executive Government alone, no such power being vested in any of the Legislative Councils. These arrangements for the exercise of legislative authority and for the changes in legislative machinery depend upon five Acts of Parliament, the 3 and 4 Will. IV, c. 85, the 16 and 17 Vic., c. 95, the 17 and 18 Vic., c. 77, the 24 and 25 Vic., c. 67, and the 33 Vic., c. 3. The Indian Legislature is expressly forbidden to make any law which shall repeal or in any way affect the provisions of any one of these five Acts. Four of these Acts are expressly named in the prohibitions, one in the first head of prohibition, and three in the second. The remaining one is included in the general prohibition contained in the sixth head. In the view that I take, the Indian Legislature cannot change the legislative machinery in India without affecting the provisions of these Acts of Parliament which created that machinery, and if it does in any way affect them then, *ex consensu omnium*, its acts are void.

On both grounds, therefore, both because Act XXII of 1869 is, as regards the Cossyah and Jynteah Hills, not a law, and because if it is a law, it is one which the Legislative Council of India is expressly prohibited from making, I should hold that it is so far void.

I have dealt with this case upon the broad grounds upon which Mr. Kennedy put it. He boldly claimed for the Indian Legislative Council of India the power to transfer its legislative functions to the Lieutenant-Governor of Bengal. Indeed, as I understood him, the only restriction he would admit was that the Legislative Council could not destroy its own power to legislate, though I see no reason why he should stop there. The Advocate-General did not, I think, go quite so far. But in my opinion there is no narrower question which can be substituted for the broad and general question which the learned counsel put and which I have considered. There are no words in the Acts of Parliament upon which legislative authority could be made transferable in one class of cases and not in others. Of course, I do not for a moment suggest that every time discretion is entrusted to others, there is a transfer of legislative authority. Every Act of the Legislature abounds with examples of discretion entrusted to the Judicial and Executive officers of Government, the legality of which no one would think of questioning. And there may be particular cases in which it would be a matter of considerable difficulty to say whether or no the discretion conferred was of the legislative kind. When the difficulty arises we must deal with it. But in the present case we have not to cope with this difficulty. By the express words of 24 and 25 Vic., c. 104, s. 9, it is only by legislation that the jurisdiction of this Court can be taken away. Whoever, therefore, takes away the jurisdiction of this Court, must exercise legislative authority for the purpose. I have stated my reasons in an earlier part of this judgment for holding that it was wholly by the Lieutenant-Governor, and not in any sense or to any extent by the Indian Legislative Council, that the jurisdiction of the High Court was assumed to be taken away. The broad and general question seems to me, therefore, necessarily to arise—Can the Legislature confer upon the Lieutenant-Governor this legislative power?

I now come to a decision which, as it appears to me, strongly fortifies the conclusion I have come to as to the powers of the Indian Legislature. Indeed, it is a decision which I rely upon far more than on my own reasoning, and which we must over-rule if

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we are to adopt the construction of the Councils' Act contended for by the Crown.

In the year 1850 a suit was brought in the late Supreme Court against a servant of the Commissioners for the Improvement of the Town of Calcutta, for the illegal seizure of a buggy. The defendant justified the seizure under Act XVI of 1847 and certain rules which the Commissioners had made under that Act, alleging that the plaintiff had not paid the carriage tax assessed upon him by the Commissioners. The plaintiff demurred to the plea, raising a question as to the legality of these rules. The first judgment was delivered by the Chief Justice, Sir LAWRENCE PEEL, as the judgment of himself and Sir JAMES COLVILLE. On that occasion the Court intimated a strong opinion that, if these rules varied the law, they were void notwithstanding that they were made under the express authority of an Act of the Legislature. When, after an amendment of the pleadings the same question again arose, Sir LAWRENCE PEEL gave the joint judgment of himself, Sir JAMES COLVILLE and Sir ARTHUR BULLER. I have referred to the Registrar's book, and this shows (which the report in Taylor and Bell does not) how the Court was constituted on the two occasions on which the case was before it. The important passage is the first paragraph in the second judgment, and is to be found at page 479 of the Report in Taylor and Bell. The learned Judges, though they express great doubts whether the rules in that particular case were legal and binding, do not finally decide that point; but they do clearly and unmistakeably lay down as a general principle of law applicable to India, that any substantial delegation of legislative authority by the Legislature of this country is void. The actual order made was a second permission to the defendant to amend his plea upon payment of costs. The second amendment was made; but I cannot find that the case went any further, and probably it was compromised. The Act itself was shortly afterwards repealed.

The case was very fully argued on two occasions; the defendant being represented by the Advocate-General and the Standing Counsel, and it is in all respects an authority which seems entitled to the very greatest weight.

I am also disposed to think that, if the American reports were available to us, we should find some authority there on this part of the case. There are several decisions of the American Courts referred to in a note to Kents' Comm., p. 504. One cannot be quite sure, without seeing the reports *in extenso*, how far these decisions go; but they seem to me to support the view that Act XXII of 1869 is, as regards the Cossyah and Jynteeah Hills, not a law.

It was asked in the course of the argument what was to be done in the case of emergency, and whether the Legislature might not do that which was necessary to meet an emergency? And assuming the answer to this question to be that the Legislature might do what was necessary, it was then argued that the Court could not enquire whether the emergency existed or not, for of this the Legislature was the sole Judge. In fact, whilst asking us to dismiss all political considerations, the learned Counsel ask us to decide this case on the ground of political necessity. But we have nothing to do with any such question at all. Upon an emergency in which danger to life and property is involved, the law, as it stands, and without any alteration, gives increased and exceptional powers to the executive. In extreme cases the executive may suspend the operation of all laws; but I am not aware that such emergencies in any way affect the powers of the Legislature; certainly not unless the Legislature were actually over-awed.

Lastly, it was said that whether the Indian Legislative Council can or cannot lawfully delegate the power to make laws, it had done so for a long series of years, and a long list of Acts passed between 1845 and 1868 has been handed in to us, all of which, it is said, must be treated as instances of delegation of legislative authority, if Act XXII of 1869 be so treated. It was then argued that Parliament must have known what the Legislature of this country had been doing; and, had it not approved what was done, would have used language which would have placed the illegality of these proceedings beyond all possible doubt. I have some difficulty in dealing with an argument based upon an assumption of fact in a matter of this kind. I imagine that Parliament when legislating for India is dependent mainly upon such information

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as may be imparted to it by the Secretary of State, or by individual members who have a special acquaintance with this country. The position is, in fact, substantially the same in this as in all other cases where the subject of legislation is not one of every-day experience. If the information thus obtained were not found to be sufficient, special inquiries would then be directed. Whether in the particular case under consideration Parliament did really arrive at a knowledge of the particular provisions in these Acts which are now relied on, I am at a loss how to determine. I cannot, however, think that we need enter upon this inquiry. For even if we presume knowledge, still, to infer ratification from silence would lead to consequences which seem to me inadmissible. Upon one particular point Parliament expressly refers to the practice here, and no doubt 'therefore was so far acquainted with it. In section 25 of the Councils' Act it is recited that doubts have arisen as to the power to make laws for the Non-Regulation Provinces, otherwise than at regular meetings of the Legislative Council in conformity with the 3 and 4 Will. IV, c. 85. The section then goes on to give validity to laws that had not been so made. But it has never been contended that this recital and this ratification have legalized the previous practice. On the contrary, the accepted view has, I believe, always been that the previous practice was put an end to by this very Act. Speaking of this very practice in a Minute recorded in 1868, Sir Henry Maine says :— "This system, of which the legality had long been doubted, was destroyed by the Indian Councils' Act. No legislative authority now exists in India which is not derived from this Statute." But if the argument of tacit recognition which I am now considering be correct, how is it possible to escape the conclusion that all the vague powers, half legislative, half executive, previously exercised in the Non-Regulation Provinces, are valid and subsisting powers? The argument seems here to stand on its strongest ground.

Nor do the Acts contained in the list which was handed in appear to me to afford (as was asserted) so many clear and undisputed instances of a transfer of legislative authority. I must guard myself against being drawn into a final expression of opinion as to the construction of Acts which are not properly

before us. I must also observe that the argument only extends to Acts passed prior to the Councils' Act. It is not, and could not be, contended that the Indian Legislature can have increased its own powers by any recent usurpation. This gets rid of the two Acts most relied on, namely, Act XXIII of 1861, section 39, and Act XXV of 1861, section 445. Neither of these Acts had been passed when the Councils' Act received the Royal assent, though probably they were passed before the Councils' Act came into operation. I may also observe that these sections only confer powers on the Executive Government to extend the Acts to Non-Regulation Provinces. But we know that as to these districts certain exceptional notions were at that time held which are now exploded. As to those Acts which were passed prior to the Councils' Act becoming law, Act VIII of 1859, section 385, and Act XIV of 1859, section 24, also relate only to Non-Regulation Provinces. Act VII of 1845 only empowers the Local Government to make rules respecting the levying of water-rates and so forth for canals which had been constructed at the expense of Government. Act XXXV of 1850 and Act XXXVI of 1857 give to the Local Government powers which are not legislative, but may be judicial. Act XVIII of 1853 seems to me merely to give power to fix the limits of cantonments. Act XVII of 1854 reserves to the Governor-General in Council powers which he would have had without this reservation. Act XXII of 1855, Act XX of 1856, Act XXIV of 1859 and Act V of 1861 are more difficult to construe. It would certainly have been safer to treat them as what are called General Clauses' Acts, and for the Legislature in each case to have sanctioned their extension. But I may observe generally as to the provisions which these and many other Acts contain for the making of rules by the Executive Government in conformity with the Act, that we have the very high authority of the Judges who decided the case of *Biddle v. Tarriny Churn Banerjee*, that the power to make such rules may be largely conferred without any delegation of legislative authority. Act XXIX of 1857 does not seem to me to confer any legislative powers at all. Act XXIX of 1858 was passed to meet a pressing emergency during the mutiny, and ought not, I think, to be taken as a precedent. Act XIII of 1859, section 5,

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and Act IX of 1860, section 9, are, in my opinion, of very doubtful validity. I am not sure that they have ever been acted upon. It is by no means easy to ascertain this, for it is one of the peculiar results of this method of legislation that there is no information upon the subject contained in the Statute Book. But this I know that I have often heard the validity of these provisions questioned. Upon the whole, the list of Acts, prior to the passing of the Councils' Act, does not seem to me to show any clear practice of transferring legislative authority which Parliament can be said to have known and recognized.

Before leaving this list I must observe that it contains a number of Acts which were evidently inserted under an entire misconception as to the nature of the difficulty which the Crown has to meet in establishing a claim now put forward on behalf of the Indian Legislature. It has never been doubted that the Legislature may confer discretion of the most extensive kind upon the Executive officers of Government. I have already adverted to this, and but for the misconception which this list discloses, I should not have thought it necessary to advert to it again. But it cannot be too clearly understood that no one denies that the Indian Legislature may entrust to the Executive officers of Government power, for example, to regulate public processions and to keep order in places of public resort. And the insertion of this provision (Act XIII of 1856, section 77) in the list handed up only shows how entirely the question before us may be misunderstood. No one would think of challenging such a provision as this, as being beyond the powers of the Indian Legislature. If my view of the law threw any doubt upon the power of the Indian Legislature to pass such an Act as this, I should abandon it at once. But, surely, it is not necessary to insist at length upon the difference between the delegation of a power to keep order in the public streets and the delegation of a power to abolish all the existing Courts of Justice in a large district, and to substitute such new ones as the *delegatus* may deem advisable. All that can be said is, that there may be a difficulty in some cases in saying whether the Act amounts to a transfer of legislative power. There would be precisely the same difficulty in drawing an exact line between the functions of the

Legislative and the functions of the Executive Council—between the powers which Judges possess to make rules of procedure and the power which they do not possess to make rules of substantive law. But this does not prove that these distinctions do not exist, or that they are not to be observed. We are, as I have already pointed out, not now called upon to deal with difficulties of this kind. If we are ever called upon to do so, I do not doubt that the utmost endeavour will be made to avoid impeding the useful action of the Legislature. I say with confidence that this Court (the only one of which I have a right to speak) has always shown the greatest care and circumspection in questioning the validity of Acts passed by the Indian Legislature. On the present occasion it has been pressed very strongly that the views of the law which I take would lead to the most disastrous consequences. Nothing has been adduced in support of this statement which appears to me quite unfounded. I would gladly have refrained from expressing any opinion upon these Acts at all, but not being able to do so, I am compelled to admit that there are some provisions in some of the Acts passed by the Legislative Council, the legality of which, upon the view of the law to which I adhere, may be doubtful. But I say distinctly that there is no ground whatever for the sweeping assertion which has been made that, on this view of the law, a very large proportion of these Acts must be at once pronounced to be illegal. No such consequences followed from the decision of *Biddle vs. Tarriny Churn Banerjee*, and my decision goes no further. The only proposition of law which I lay down is that the Legislative Council of India cannot confer any power to legislate upon the Lieutenant-Governor of Bengal.

In my opinion, our jurisdiction in the Cossyah and Jynteah Hills is now the same as it was before the notification was issued by the Lieutenant-Governor, and we ought therefore to send for the record of this case in order to see whether the appeal should be admitted.

KEMP, J. :—

I concur in the judgment of Mr. Justice MARKBY.

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## [CIVIL APPELLATE JURISDICTION.]

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TARA CHAND BISWAS AND OTHERS . . . DEFENDANTS;  
AND  
NAFAR ALI BISWAS . . . . . PLAINTIFF.

*Failure of consideration—Sale of Patni Tenure—Regulation VIII of 1819—Interest.*

Where a zemindar sells a patni tenure for arrears of rent, and the sale is afterwards set aside, the purchaser can, under Regulation VIII of 1819, Section 14, Cl. 1, require the Court to compel the zemindar to indemnify him on account of all payments of rent which he may have made; and if he does not do so, he cannot set up his loss in answer to a liability which he has incurred.

Where a sum of money becomes due and payable at a specified time, the Court may award interest, in the shape of damages, for such period thereafter as the money remains unpaid.

**R**EGULAR APPEAL from a decree passed by the Subordinate Judge of Nuddea.

This was an action for the repayment of money, with interest, on the ground of failure of consideration. The essential facts are as follows: Radha Jeeban Moustafi and another were the owners of a patni talook. The zemindars sold the talook for arrears of rent, under Regulation VIII of 1819, in the month of Joisto 1276. The defendants bought the talook and granted a durpatni of it to the plaintiff on the 5th of Bhadro 1278. Meanwhile Radha Jeeban Moustafi brought a suit against defendants to set aside the sale on the ground of irregularity. The sale was set aside by the District Court on the 23rd of Joisto 1279; and the plaintiff was ejected on the 26th of Joisto 1279. The defendants appealed to the High Court against the decision setting aside the sale, and the case was returned on the 6th of June 1873 for a finding of the Lower Court on the question of notice; and there the sale was finally set aside on the 23rd of September 1873.

At the time of taking the durpatni from the defendant on the 5th of Bhadro 1278, the plaintiff paid Rs. 5,100 in hand, besides

agreeing to pay a yearly rent; and the durpatni pottah contained a clause to the effect that, if the plaintiff's durpatni rights should be destroyed by the extinction of the defendants' patni right, the consideration money should be repaid, with interest from the date on which plaintiff's rights would be extinguished. Between the 23rd of Joisto 1279, the day on which the District Court set aside the sale, and the final decision on the 23rd of September 1873, the defendant demanded and received from the appellant, as rent, three sums amounting to Rs. 900.

Plaintiff sued to recover the Rs. 5,100 and interest at 12 per cent. from the 23rd of Joisto 1279, the date on which the auction sale was set aside, together with the Rs. 400, Rs. 200, and Rs. 300, and interest at 12 per cent. from the dates of payments. The suit was decreed as claimed by the Lower Court, and defendant appealed on the ground that (1) the rate of interest given was excessive; and that (2) the Lower Court was wrong in giving a decree for the sums paid as rent.

For Appellants: *Baboo Ashutosh Dhur.*

For Respondents: *Baboo Mohiny Mohun Roy and Bipradas Mookerjee.*

The judgment of the High Court<sup>1</sup> was delivered by

MARKBY, J. :—

With regard to the items of four hundred rupees, two hundred rupees and three hundred rupees, which were paid on the 24th Srabun 1279, 1st Aghran 1279, and 17th Assar 1280, and which the plaintiff seeks to recover, these were sums paid by him in respect of the rent due from him as durpatnidar to the patnidar. The defendant purchased the patni tenure at a sale which, at the time these payments were made, had been set aside, and they were, no doubt, therefore, made in contemplation of the possibility that the decree setting aside the patni sale, which was under appeal, might be ultimately reversed, and the plaintiff restored to his original position as durpatnidar under the defendant. It is quite clear as to all these three sums that they are moneys which the

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<sup>1</sup> MARKBY AND MITTIE, J.J.

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 ———  
*Judgment.*  
 ———  
 MARKBY, J.

defendant ought in justice and equity to pay back to the plaintiff, for the defendant has never been restored to possession, and the sale to the defendant has been finally set aside. The only answer that the defendant has made to the claim is, that he in his turn was himself compelled to pay the rent which accrued during that period to the zemindar. If he did so he had in his own hands the means of recovering those sums. He was a party (defendant) to the proceedings taken by the former patnidar for setting aside the sale, and when the former patnidar succeeded in getting that sale set aside, the defendant might have taken advantage of the express provision of the first clause of Section 14, Regulation VIII of 1819, in his favor, and have required the Court to compel the zemindar or other person, at whose suit the sale was made, to indemnify him against all loss on account of those payments. The defendant was not only able to do that, but for the protection of his own tenant (the plaintiff in this suit) he was bound to do it, and if he incurs any loss from his not having done so, he must take the consequences of it. We do not think that he can set up as any answer to the present claim of the plaintiff that he has paid any rent to the zemindar. We think, therefore, that the decision of the Lower Court as to those three sums is right.

With regard to the interest the Court below was clearly entitled to give such interest as it thought right in the shape of damages<sup>1</sup> for the period which had elapsed from the time when the consideration money became repayable to the plaintiff, that is from the 3rd Joisto 1279. The only question is, what amount of interest it would be proper to give for that period? We think that twelve per cent. is too high a rate, and we think that six per cent. is a fair rate to be allowed in this case. There being no other objection to the decree of the Lower Court, subject to this change in the rate of interest the appeal will be dismissed. We see no reason to depart from the usual practice in respect of costs. The plaintiff will get his costs in this Court and the Court below, upon the amount now decreed.

<sup>1</sup> See the rule on this subject laid down by the House of Lords in *Cook vs. Fowler*, Law Rep., 7 H. L., 27.

## [CIVIL APPELLATE JURISDICTION.]

LAND MORTGAGE BANK OF INDIA . . . PLAINTIFF;  
 AND  
 SYUD MUNSUB ALI AND OTHERS . . . DEFENDANTS.

1877  
 December 11.

*Commission to examine witnesses—Return—Letter of Judge—Evidence.*

A letter from a Judge cannot be given in evidence to show that a formal return, made by him on a commission to examine witnesses was wrong.

**SPECIAL APPEAL** from a decree of the Subordinate Judge of Shahabad, affirming that of the Moonsiff of Buxar.

This was a suit for damages on the ground of fraud. A commission was issued to the Small Cause Court at Calcutta to examine plaintiff's witnesses; but the commission was returned unexecuted, the return stating that the plaintiff took no steps in the matter. The Moonsiff dismissed the case with costs as not proved, and also on the ground of plaintiff's negligence in regard to the commission. The real ground of returning the commission unexecuted, as appeared from a subsequent letter of the Judge of the Small Cause Court at Calcutta, was because it was irregular on its face. Plaintiff appealed, but the appeal was dismissed. He then preferred this special appeal.

For Appellant: *Baboo Kashee Kant Sen.*

For Respondent: *Wood.* With him *Baboo Bolye Chand Dutt.*

The judgment of the Court<sup>1</sup> was delivered by

AINSLIE, J. :—

AINSLIE, J.

There is no ground for interfering with the judgment of the Court below. It is quite clear that the Moonsiff was right on the face of the return before him, namely, that of the 22nd of

<sup>1</sup> AINSLIE and KENNEDY, J.J

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AND OTHERS.  
—  
*Judgment.*  
—  
AINSLIE, J.

April 1876, from the Small Cause Court of Calcutta. From some further letter produced before the Lower Appellate Court it would appear that possibly there has been a mistake in the return made; but we think that the Subordinate Judge could not allow a letter from the Judge of the Small Cause Court, professedly based on information given to him by his clerk, to be used as evidence to show that the formal return made by him as Judge of the Court was wrong. The real fact of the matter is, that if there has been any error in the form of commission issued it was from the fault of the legal adviser of the plaintiff that it was not discovered and corrected before the Commission left the Moonsiff's Court.

The appeal is dismissed with costs.

## [CIVIL APPELLATE JURISDICTION.]

GAGAN MANJHI AND OTHERS . . . . . DEFENDANTS ;

AND

GOBIND CHUNDER KHAN AND OTHERS . . . PLAINTIFFS.

1877  
Nov. 28.*Kabuliat—Enhanced Rent—Tender of Pottah.*

Where plaintiff sues for a kabuliat, and the Court thinks that he is not entitled to a kabuliat at the rate claimed, but at a lower rate, no presumption can be made in favour of his having been willing to grant a pottah at that lower rate. He is, therefore, not entitled to a decree for a kabuliat at that lower rate, and his suit should be dismissed.

*Gholam Mohamed vs. Asmat Ali Chowdhry*, 10 W. R., 14 (F. B.), followed.

*Gopernath Janah vs. Jeteo Mollah*, 18 W. R., 272, dissented from.

**A**PPEAL under the Letters Patent from a decree passed by WHITE, J., affirming a decree of the First Subordinate Judge of Rajshahye, which reversed that of the Moonsiff of Nattore.

The judgment appealed from is as follows :

WHITE, J. :—

WHITE, J.

This is the case of a suit for a kabuliat at an enhanced rent, brought by the special respondents, who are the plaintiffs below and the owners of an undivided share of the jote out of which the rent issues, against the special appellant (defendant below) who is a ryot in occupation of the jote, and who is found by both the lower Courts to have paid and been paying separately to the plaintiffs their share of the rent, and to be a ryot liable to enhancement of the rent, and to have been duly served with a proper notice of enhancement under section 14 of Act VIII (B.C.) of 1869. The owners of the remaining undivided share in the jote have also been made parties to the suit as defendants, but do not appeal.

The enhancement was sought on the first ground mentioned in section 18 of the above Act, namely, that the rent paid by the defendant was below the rate prevailing in adjacent places. The



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Moonsiff considered that the plaintiffs had not established that ground of enhancement, and dismissed their suit. The Lower Appellate Court, having elaborately examined the evidence, decided that the plaintiffs had made good their claim and gave the plaintiffs a decree.

Against that decree the special appellant has urged two objections: the first is, that "the plaintiffs, being the owners of a joint undivided fractional share, are not competent to maintain a suit for a kabuliat at an enhanced rate of rent with respect to their share only." In framing this objection the special appellant leaves out the important fact that both Courts have found that he has been in the habit of separately paying to the plaintiffs their share of the rent.

Where a tenant acts thus or agrees to act thus towards the owners of such a share in his jote, he really places these owners, with respect to their share of the rent, in the position of sole landlords. He has in a manner, as regards these owners, and as regards their share of the rent, estopped himself from averring that they are not his sole landlords; and, on principle, such owners ought, as regards their share of the rent, to have the same power as sole landlords to require a kabuliat for their share of the rent, or to sue for an enhancement of such rent<sup>1</sup> on proper notice being given, or to sue for a kabuliat at such enhanced rent as they can show to the satisfaction of a Court of justice to be fair and equitable. The special appellant contends that the result of such a suit as the present one is to split his tenure. But that is an error. His tenure is not split, but only his rent; and that is done by his own act and with his own consent, and was done long ago when he first agreed to pay and did pay rent separately to the owners of an undivided share in his jote. It is not necessary, however, to resort to principle for the determination of the question, for I consider that it has already been settled against the view of the special appellant by the decisions of this Court. The doctrine is to be found in *Gunga Narayan Doss vs. Sharoda Mokun*, 12 W. R., 30; *Ramnath Ruckhit vs. Chund Hossein*, 14 W. R., 433;

<sup>1</sup> This point has been referred to a Full Bench on an appeal from the judgment of PRINSEP, J., which has been reported in I. L. R., 3 Cal., 474. See the next case, page 248, *infra*.

6 B. L. R., 356; and *Rakhal Chunder Roy vs. Mahtab Khan*, 25 W. R., 221.

The other objection is thus worded in the grounds of appeal: "The plaintiff having failed to prove the rate of rent in the plaint and in the notice mentioned, the Courts below ought to have held that there had been no proper tender of a pottah under section 10 of Act VIII (B.C.) of 1869, and ought entirely to have dismissed the plaintiffs' suit. The said Court is wrong in holding that the plaintiffs were entitled to a kabuliat at such rate as the Court thinks fair and equitable."

The facts are that the rate claimed in the notice of enhancement and in the plaint was Rs. 39-4 and a fraction, and that the Court decreed Rs. 36-1 and a fraction as the fair and equitable rate.

Section 10 of the Act says that "the tender to any ryot of a pottah, such as the ryot is entitled to receive, shall be held to entitle the person to whom the rent is payable to receive a kabuliat from such ryot." The argument of the special appellant is that, inasmuch as the Court has not adopted the rate claimed by the plaintiff in his notice of enhancement, viz., Rs. 39-4, but has fixed it at Rs. 36-1, it follows that the plaintiffs have not before suit tendered to the defendant such a pottah as he was entitled to receive, and therefore the suit should be dismissed. If this argument is well-founded, it is clear that the landlord might be involved in a number of fruitless suits, and some of the objects of the Act, so far as the landlord is concerned, would be in a great measure defeated. One object of the Act is to secure the intervention of a Court of justice in fixing fair and equitable rates of rent between landlord and ryot, where the latter has a right of occupancy but does not hold at fixed rates, and where the landlord claims to enhance the rent to a rate which the ryot will not agree to. The landlord has a right to enhance the rent of such a ryot on establishing one or other of the grounds of enhancement mentioned in the 18th section of the Act, but he cannot himself fix the enhanced rate without the consent of the ryot. If the ryot will not consent, his only course is to bring a suit. Before doing so he must give the ryot a notice specifying the rent which he claims, and the ground on which the enhancement is sought. It is then the

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duty of the Court, under section 5 of the Act, to fix a fair and equitable rate of rent if it considers the ground of enhancement is made out. Another object of the Act is to secure that the engagements of landlords and tenants should be put into writing. Section 2 directs that every ryot shall be entitled to receive from his landlord a pottah, and section 10 prescribes the correlative right of the landlord to receive from his ryot a kabuliat or counterpart of the pottah. The last clause of that section, although prescribing that the tender of a pottah should precede the right to a kabuliat, does not, in my opinion, affect the right of the landlord to sue for an enhanced rent. He is entitled to bring such a suit, under the 5th section of the Act, when he and his ryot—as in the present case—dispute as to the rate to be paid. The substance of a suit for a kabuliat at an enhanced rent is the claim of the plaintiff to be paid an enhanced rent, and the prayer for the kabuliat is something that follows upon the success of the claim. That the Legislature contemplated suits being brought for kabieliats at enhanced rates, in which it would be the duty of the Court to fix fair and equitable rates, is clear from the 28th section of the Act, which provides that suits for kabieliats, and for the determination of the rates of rent at which such kabieliats are to be delivered, may be instituted at any time during the tenancy.

If the plaintiff in this suit had sued for an enhancement of the rent alone without asking for a kabuliat, he would have been unquestionably entitled to the decree which he has now got for the payment of rent at the rate which the Court has found to be equitable. On what principle should his suit stand wholly dismissed because he asks also for a kabuliat, which is in effect a reduction into writing of the contents of that decree? The utmost that the special appellant could ask the Court to do, when the Court fixes a rate lower than that claimed in the notice and plaint, would be to refuse the plaintiffs' prayer for a kabuliat on the ground that the result showed that the plaintiff had not tendered to the defendant a pottah *such as he was entitled to receive*. If the Court acceded to this request, what would be the consequence? The plaintiff would be entitled, after making the tender insisted on by the special appellant, to bring a second suit

against the defendant for the kabuliat, which would be a futile proceeding, except to create costs and vexation ; for supposing the kabuliat to be denied, as it must be, and the ryot to refuse to execute it, then the result of the second suit would be to entitle the plaintiff under the 66th section of the Act to a copy of the decree for enhancement under the signature and seal of the Court, which copy would, by virtue of that section, have the force and effect of a kabuliat executed by the ryot. I should be slow to put a construction upon the latter clause of section 10 which would lead to such a result. The point, however, appears to me to be concluded by authority. *Gopeenath Janah vs. Jeteo Mollah*, 18 W. R., 272, is a case on all fours with the present as regards this point. That was a suit for a kabuliat at an enhanced rent. It was there held that the failure of the landlord to prove his right to a kabuliat, at the rate claimed by him in his notice of enhancement and plaint, did not disentitle him to a decree for an enhancement of the rent at such rate as the lower Court had found to be fair and equitable. In that case as in the present, no pottah could have been tendered before suit, such as the ryot was entitled to receive, in the strict sense of the words, as contended for by the special appellant.

Again, in the Full Bench decision in 10 W. R., 14 F. B., (*Gholam Mohamed vs. Asmut Chowdhry*), PEACOCK, C.J., whilst deciding that a landlord, who brought his suit for an enhanced rent without notice, must stand or fall by the rate fixed in his plaint, adds :—"If they (i.e., the land owners) wish to enhance the rent of a ryot, they should give notice under section 13 ; and if, after that notice takes effect, the tenant fails to pay the enhanced rent demanded, the landowner may sue for rent at the rate demanded by the notice. The Court will then determine whether the plaintiff is entitled to enhance, and whether he has served the necessary notice, and then will decree payment to him either at the old rate or at the rate to which the Court may consider the landlord to be entitled to enhance the rent." The suit here indicated is in substance the very suit which the plaintiff has brought in the present case. The prayer for the kabuliat makes no difference in the nature of the suit. It is simply consequential relief

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which the plaintiff is entitled to on the Court fixing the rate at which the enhanced rent is to be.

I am of opinion, therefore, that the second objection taken by the special appellant also fails, and that the lower Appellate Court was warranted, both by authority and by the provisions of the Rent Act, in making the decree which it did; viz., "that defendant do execute a kabuliati for Rs. 86-1-3, being the annual rent fixed for his holding the quantity of land of the plaintiffs' share; but before obtaining the kabuliati, the plaintiffs do prepare a pottah according to the terms of the kabuliati and tender it to the defendant." Accordingly, I dismiss the special appeal with costs.

The defendant appealed under the Letters Patent.

*Baboo Kishory Mohun Roy*, for Appellants.

*Baboos Srinath Dass, Grija Sunkur Mosumdar and Isur Chunder Chuckerbutty*, for Respondents.

The judgment of the Court<sup>1</sup> was delivered by

GARTH, C.J. GARTH, C.J. :—

We think that this appeal should be allowed. The judgment of the Subordinate Judge and that of Mr. Justice WHITE, appear to us to be directly opposed to the ruling of the Full Bench of this Court reported in 10 W. R., 14 (F. B.)—*Gholam Mohamed vs. Asmut Ali Chowdhry*.

The grounds upon which that case proceeded, as we understand them, are these: That in order to entitle a landlord to sue a tenant for a kabuliati at a certain rent, he should either have tendered to the tenant a pottah at the rate of rent mentioned in the kabuliati, or he should be willing to grant a pottah at that rate; and when he brings a suit against his tenant for a kabuliati at a certain rent, it must be presumed that he is ready to grant a pottah at that rate. That presumption would enable him to succeed in his suit, if the Court considers that the rent which he claims is the correct amount. But if the Court thinks that he is not entitled to a kabuliati at the rate claimed, but at

<sup>1</sup> GARTH, C.J. and BIRCH, J.

a lower rate, then it is plain that no presumption can be made in favor of his having been willing to grant a pottah at that lower rate. On the contrary, the fact that he has attempted by legal proceedings to enforce the payment of the higher rent, raises a presumption that he would not have been content, when he brought his suit, to accept a kabuliat at the lower rent. He is, therefore, not entitled to a decree for a kabuliat at the smaller rate, because the Court cannot presume that he would have granted a pottah at that rate. This is the ground upon which, as we understand it, the judgment of the Full Bench proceeds; and it has since evidently been acted upon in that sense in many other instances.

It appears to us, that the case reported in 18 W. R., 272—*Gopeenath Janah vs. Jeteo Mollah*, decided by Mr. Justice KEMP and Mr. Justice GLOVER, is not in accordance with the rule laid down by the Full Bench, and that we are, therefore, justified in dissenting from it.

It has been contended before us, that it is the same thing whether the landlord sues for enhanced rent *simpliciter*, or sues for a kabuliat at an enhanced rate; but that is not so. Where a landlord after notice sues for enhanced rent, the Court may give him a lower rate of enhanced rent than that which he claims; because in such a suit it is not necessary that the landlord's willingness to grant a pottah at the rent demanded should be proved or presumed; and where, in that case, the proper amount of rent has been ascertained and fixed between the parties, the landlord may safely demand from the tenant a kabuliat at that rate and sue him for it.

This distinction between suits for enhanced rent, and suits for a kabuliat at enhanced rent, appears to us to be clearly pointed out by the Chief Justice in the Full Bench case.

For these reasons we think that the Subordinate Judge was wrong; and we consider that in a suit of this nature no distinction can be drawn between cases in which a kabuliat is demanded after notice, and cases in which no such notice is given. The judgments of both the Appellate Courts will be reversed, and the judgment of the first Court restored, with costs in each Court.

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 Judgment.  
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## [CIVIL APPELLATE JURISDICTION.]

1877  
December 13. ANOO MUNDUL . . . . . DEFENDANT;  
AND  
SHAIKH KAMALOODDEEN . . . . . PLAINTIFF.

*Rent suit—Non-joinder of Co-sharers—Evidence.*

Where a tenant has agreed with his landlords to pay a certain rent for his whole holding, the fact that he has paid each landlord his proportionate share of the rent is not conclusive but merely presumptive evidence that, for the original contract, there has been substituted a separate contract with each of his lessors.

**T**HIS was a special appeal from a decree of the Subordinate Judge of Jessore, affirming that of the 3rd Moonsiff of that Station.

The defendant, Anoo Mundul, held land under the plaintiff and his co-sharers as a single holding, at a single rent. Frequently he used to pay each sharer his proportionate amount of the rent and get his receipt therefor. Plaintiff brought this suit for his proportionate part of the rent, when defendant objected on the ground that plaintiff should have joined his co-sharers as co-plaintiffs; but this objection was overruled in the Court below, and the suit decreed. Defendant appealed.

Baboo *Jogesh Chunder Roy*, for Appellant.

Baboo *Taruck Nath Sen*, for Respondent.

AINSLIE, J. AINSLIE, J. :—

It seems to me that this suit ought to have been dismissed.

It is quite clear, on the allegation in the plaint, that the plaintiff has come into Court suing for a share of the rent of the property held under a single engagement. His asking for a proportionate part of the whole rent shows that there was a single rent. It is not alleged in the plaint that the original contract to pay a single rent was ever abandoned by the tenant,

or that he at any time substituted for it separate contracts with each of his lessors. Had there been such separate contracts, it is quite clear that the plaintiff would have sued under the contract for the whole of the separate smaller sum of rent due to him, and not for a share of the rent due under a larger contract.

The Courts below have inferred from the mere fact of payment of rent in separate portions that the original contract has been abandoned.

This mere fact of payment is not conclusive evidence of any intention on the part of the tenant to split up his holding. So long as there is no dispute among the sharers, he may be well content to pay them according to their known shares, if they agree so to take their money; but it is optional with him to put an end to that form of payment whenever it suits him to do so, whether there is a dispute between the sharers or not. This payment in separate shares is no doubt good as corroborative evidence of the existence of a new contract, but taken alone it does not prove its existence.

The objection to the frame of the suit was raised in the very opening of the written statement of the defendant, and it has been pressed in all the Courts.

It appears to me that the defendant was fully entitled to say that he will not pay more than one single rent jointly to all persons interested to receive it, and that the Courts are bound to support him in this declaration.

The appeal is allowed, and the suit disallowed, with costs.

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DEEN.

*Judgment.*

AINULLIE, J.



## [CIVIL APPELLATE JURISDICTION.]

1877.  
December 20.

MUSSAMUT MAINA KOER . . . . . PLAINTIFF;

AND

LUCHMUN BHUGGUT, AND OTHERS . . . DEFENDANTS.

*Rival decree-holders—Act VIII., 1859, sections 256 and 257—Act X of 1877, section 311.*

Act VIII. of 1859, sections 256 and 257, do not apply to third parties.

*Joge Narain Singh vs. Bhugbano*, 2 W. R., 13, *Mis.* followed.

*Krishnarav Venkatesh vs. Vasudev Anant*, 11 Bom., 13, dissented from.

**R**EGULAR APPEAL from the order of the Subordinate Judge of Patna.

This was a dispute between rival decree-holders. They had attached the same property of the judgment-debtor, which property was sold in satisfaction of the respondent's decree. The appellant applied, under Act VIII., 1859, sections 256 and 257, to set aside the sale, but the application was rejected. She then preferred this appeal.

Baboo *Mohesh Chunder Chowdhry*, for Appellant.

Moonshee *Mahomed Yusuf*, for Respondent.

The following judgments of the High Court<sup>1</sup> were delivered;

AINSLIE, J. AINSLIE, J. :—

A preliminary objection has been taken to the hearing of this appeal on the ground that no appeal lies in such a case as this, the question at issue being between two decree-holders and not between the parties to a single suit.

This Court held in the case reported in 2 Weekly Reporter, 13 *Mis.*—*Joge Narain Singh vs. Bhugbano*, that sections 256 and 257 do not apply to a third party, and this is the view which I have always taken of those sections.

<sup>1</sup> AINSLIE and KENNEDY, J.J.

It has, however, been pointed out that there is a case in 11 Bombay, 5—*Krishnarav Venkatesh vs. Vasudev Anant*, to the contrary ; but it seems to me that we ought to follow the ruling of this Court in the matter, more especially as it is in conformity with the rule laid down in the New Civil Procedure Code, section 311.

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 AND OTHERS.  
 Judgment.  
 AINSLIE, J.

I would, therefore, dismiss this appeal with costs.

KENNEDY, J. :—

KENNEDY, J.

I quite agree. Even if I did not agree with the case in 2 Weekly Reporter, 13 *Mis.*, I would have thought myself bound to follow it. I am inclined to believe that the construction there put on sections 256 and 257 was perfectly correct; but it would be idle now, when the New Procedure Code has expressly provided for the case, even if my opinion were different, to proceed to have that which has hitherto been deemed correct law reviewed.

## [CIVIL APPELLATE JURISDICTION.]

1877.  
December 20.

GIRI DHAREE SINGH AND ANOTHER . . . PLAINTIFFS;

AND

RAM KISHORE NARAIN SINGH AND OTHERS, DEFENDANTS.

*Execution—Limitation—Act IX of 1871, Sch. II, Art. 167.*

Application for execution of a decree must be made within three years of a previous application as required by Act IX of 1871, Sch. II, Art. 167.

*Umrashankar Lakmiram vs. Ohhotalal Vageram*, I. L. R., 1 Bom., 19, held not to apply.

**S**PECIAL APPEAL from a decree of the Judge of Sarun, affirming that of the Subordinate Judge of that District.

This was an application for execution of a decree. An application for execution of the same decree was made on the 6th of February 1869, against the present defendants, the representatives of the judgment-debtors, who objected that they could not be proceeded against. The attachment was taken off on the 11th of December 1869; but a decree was given in the Lower Appellate Court in favor of the decree-holder's right to proceed against the defendants, on the 15th of August 1870: this decree was affirmed in special appeal on the 21st of December 1870. The next application was made on the 12th of September 1873; but no objection seems to have been raised till the present application was made. The question was:—Was the decree barred by limitation when the application for execution was made in 1873?

Baboo *Aubinash Chunder Banerjea*, for Appellants.

Mr. *M. L. Sandel* and Moonshee *Mahomed Yusuf*, for Respondents.

The judgment of the Court<sup>1</sup> was delivered by

**AINSLIE, J. AINSLIE, J. :—**

It appears that, under the circumstances of this case, taking into account the very long delay between the dismissal of the

<sup>1</sup> AINSLIE and KENNEDY, J.J.

special appeal on the 1st of December 1870, and the application of the 12th of September 1873, which the special appellant now wishes to treat as an application to revive former proceedings, it is impossible to hold that that application was substantially a revival. It must be taken that, as a matter of fact, the attachment was taken off by the order of the first Court on the 11th December 1869, and that the decree-holder so understood the order and acquiesced therein. His application, therefore, is not within the period from any previous application prescribed by Article 167, Schedule II of the Limitation Act (IX of 1871).

It has been contended on the authority of a case reported in I. L. R., 1 Bom., 19—*Umrashankar Lakmiram vs. Chhotalal Vageram*, that the application was made in time, counting from the dismissal of the appeal; but without expressing any opinion as to the view taken in the decision referred to, it seems to me that we are bound to reject that contention because the application was not one to execute the decree made in appeal on the 1st December 1870, that being simply an order for the dismissal of the special appeal.

We are of opinion, therefore, that this appeal must fail.

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 GIRI DHAREE  
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 —  
*Judgment.*  
 —  
 AINSLIE, J.

## [CIVIL APPELLATE JURISDICTION.]

1877  
November 23.

GOPI MOHUN DASS . . . . . DEFENDANT;  
AND  
TINCOURI GUPTA . . . . . PLAINTIFF.

*Cause of Action—Decree in a previous Suit—Execution, failure to take out.*

Where a party brings a suit for possession and obtains a decree which he neglects to execute, no subsequent suit on the same cause of action will lie.

**SPECIAL APPEAL** from a decree of the Additional Subordinate Judge of Zillah East Burdwan, modifying that of the Moonsiff of Cutwa.

Plaintiff, whose original cause of action arose in 1860, brought a previous suit, for possession of Y and eight annas of X against the defendant. The suit was compromised on the 25th of January 1870, and a decree was passed on the basis of the compromise, awarding the whole of X to the plaintiff. This decree was never executed. Subsequently, defendant having refused to allow plaintiff to take possession of X, the present suit was brought on the 26th of May 1875.

The Court of First Instance held that the claim for the eight annas of X, which had been in issue in the suit of 1870, was barred by the twelve years rule of limitation; but that the claim for the other eight annas was not barred, as plaintiff's right to that was first created by the compromise of 1870. Plaintiff alone appealed; and the lower Appellate Court held that no part of the plaintiff's claim was barred, as it was wholly based on the compromise of 1870. Defendant appealed from the judgment of the lower Appellate Court.

No question as to the effect of the decree of the 25th of January 1870 was considered in the lower Courts.

Baboo *Sreenath Dass* and Baboo *Guru Dass Banerji*, for the Appellant, contended that the plaintiff's only remedy was by executing the decree of 1870, and taking possession accordingly:

and, as the execution of that decree was barred by limitation, that plaintiff's title to the land in dispute was extinguished.

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Gopi Mohun  
Dass  
v.  
TINCOURI  
GUPTA.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Bohidonath Dutt*,  
for Respondent.

*Judgment.*

The judgment of the Court <sup>1</sup> was delivered by

JACKSON, J. :—

JACKSON, J.

In respect of that part of the plaintiff's suit which is now before us, and which relates to a claim to eight annas share in lands, touching which she had previously brought a suit and obtained a decree, it appears to me that she is clearly barred. Having obtained a decree in respect of that eight annas share, she was bound to execute that decree unless she could get into possession amicably or otherwise. That she did not do, and it seems that, some time after the decree by compromise was arrived at, she endeavoured to get into possession, but possession was refused. It lay upon her then to take the necessary steps within the time prescribed by law for executing her decree. She did not do that, but has brought a fresh suit. The law does not allow her to do so; for regard being had to the circumstances, it seems that she is in fact reverting to her original cause of action, viz., withholding possession of the eight annas share to which she was originally entitled. It appears to me that the judgment of the lower Appellate Court is erroneous and must be reversed with costs.

<sup>1</sup> JACKSON and McDONELL, J.J.

## [CIVIL APPELLATE JURISDICTION.]

1877  
November 28.

LALA DOUL NARAIN AND OTHERS . . . PLAINTIFFS;  
AND  
RUNJIT SINGH AND OTHERS . . . . . DEFENDANTS.

*Construction of Document—Usufructuary Mortgage.*

In ascertaining whether a deed, confessedly ambiguous, amounts to an usufructuary mortgage or to a lease in perpetuity, the Judge should look within the four corners of the instrument before him, and ascertain from it what kind of transaction the parties had in view when they entered into it.

In the case of an usufructuary mortgage, where no term is specified, the mortgagor is entitled to re-enter on the property when, on taking an account, he is able to show that the principal and interest have been satisfied.

**S**PECIAL APPEAL from a decree passed by the District Judge of Bhaugulpore, affirming that of the First Subordinate Judge of that District.

This was a suit for *khas* possession, and turned on the construction of an instrument, the terms of which are briefly these:—The plaintiffs' ancestors covenant to give the defendants' ancestors a farming lease for the term of the plaintiffs' mokurrari (*ticca tabhali mokurrari*); it is again recited in another part of the deed that the farming lease is to hold good as long as the mokurrari itself holds good (*lagait bhali mokurrari khad*), at an annual rent of Rs. 19, in consideration of payment of the sum of Rs. 1,450; it is further stipulated that, if plaintiffs' mokurrari tenure should be extinguished by resumption on the part of Government, the defendants, and not the plaintiffs, shall be entitled to take a settlement of the village from Government, unless the latter repay to the former the consideration money (here described as *zuripeshgi*), in which case the plaintiffs, and not the defendants, would be entitled to the settlement.

Plaintiffs contended that the transaction was an usufructuary mortgage; defendants, that it was a lease in perpetuity. Evidence

was given that at the time the deed was entered into, July 18th, 1845, both parties apprehended that Government would resume the tenure.

The Court of First Instance held that the transaction was a mortgage, but dismissed the suit on the ground that plaintiffs had not proved the mortgage debt was satisfied. Both parties appealed. The Judge dismissed plaintiffs' appeal, and decreed that of defendants', holding that the transaction amounted to a lease in perpetuity. Plaintiff then brought this Special Appeal.

Messrs. *Twidale and Sandel*, for Appellants.

Baboo *Mohesh Chunder Chowdhry*, Baboo *Kashi Kant Sen* and Baboo *Hem Chunder Banerjee*, for Respondents.

The judgment of the Court' was delivered by

JACKSON, J.:—

JACKSON, J.

The plaintiff in this case does not claim to put an end to the tenure granted by him in consideration of the advance, unless it so happened that the proceeds of the estate in the hands of the lessee had been sufficient to satisfy both principal and interest. I think the Subordinate Judge took a correct view of the matter, when he considered that he had to look within the four corners of the instrument before him, and to ascertain from it what kind of transaction the parties had in view when they entered into it. It is too familiar to excite surprise, that parties entering into agreements, even in respect of immoveable property to which they attach so much importance, do not resort to competent advisers for the preparation of their documents, but draw up those instruments with such assistance as is to be had in the immediate vicinity of their homes. The result is, that the greatest embarrassments constantly arise in our Courts in construing these documents. Now, it seems to me that, in considering the terms of the document before us, the Subordinate Judge is also right in attaching to it the meaning of a mortgage. The word used is *ticca*, the receipt of a zuripeshgi is recited, and an express provision is also made for re-entry on the part of the

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lessors, irrespective of any term, upon re-payment of the amount advanced, on the occurrence of a particular contingency. That contingency, it appears from the evidence as well as from the terms of the document, was the resumption of the tenure by the Government, which was anticipated though it did not occur; and the instrument provided that, when settlement was to be made with the party entitled, the lessee was to be entitled to take the settlement unless the lessor repaid the advance, and in that way qualified himself for taking the settlement. That apprehended contingency, to my mind, fully explains the passage occurring in the deed, to which so much importance has been attached by the defendant, viz., *ticca tabkali mokurrari*. It means not so long as in the ordinary course of things it would last, that is, for ever; but so long as the mokurrari is undisturbed, and that was in expectation of a disturbance likely to happen within a certain time. These facts taken together appear to me distinctly to show that what the parties had in their contemplation was a transaction in the nature of a mortgage. Baboo Mohesh Chunder Chowdhry is quite right in saying that in such cases, where the term is provided, it is immaterial whether the principal and interest has been re-paid, the mortgagee being entitled to retain possession, on payment of the *ticca* rent, for the whole of the term. In this case there is no term specified. But I think, in accordance with the ordinary rule, the mortgagor is entitled, where no term is specified, to re-enter on the property if, on the taking of an account, he is able to show that the principal and interest have been satisfied. That being so, I think the judgment of the lower Appellate Court is erroneous, and that the case must go back to that Court in order that it may determine on the appeal of the plaintiff whether the amount of advance, together with the interest, has been paid. We do not, under the circumstances, give any costs in this appeal.

## [PRIVY COUNCIL.]

|                                    |              |                        |
|------------------------------------|--------------|------------------------|
| RADHA PROSHAD SINGH . . . . .      | PLAINTIFF ;  | } 1877<br>November 29. |
| AND                                |              |                        |
| RAM COOMAR SINGH AND OTHERS . . .  | DEFENDANTS.  |                        |
|                                    |              |                        |
| RADHA PROSHAD SINGH . . . . .      | PLAINTIFF ;  | }                      |
| AND                                |              |                        |
| THE COLLECTOR OF SHAHABAD ON BE-   | } DEFENDANT. |                        |
| HALF OF RAM JAWUN SINGH, MINOR     |              |                        |
| UNDER THE COURT OF WARDS . . . . . |              |                        |

*Accretion—Re-formation on old site—Adverse possession.*

It was decided in *Lopes's case* (13 Moore's Ind. App., 467 ; 14 W. R., 11, P. C. ; 5 B. L. R., 521) that where property is wholly submerged by a river, any land forming afterwards on the site will, when the ownership of that site is proved to exist in the former owner, remain in him, and the accretions will not belong to the adjacent proprietor. This rule cannot, however, be taken to apply to land in which, by long possession or otherwise, another party has acquired an indefeasible title.

Although, in the case of a wandering and navigable stream, the bed of the river may be said temporarily to belong to the public domain, that state of things exists only while the water continues to run over the ground.

**T**HESE were two out of seven appeals to the Privy Council from decrees passed by the Calcutta High Court. The judgment of that Court will be found reported in 22 W. R., 238. The facts of the case are sufficiently set forth there and in the following judgment of their Lordships<sup>1</sup> of the Privy Council :—

The appeals of which their Lordships have now to dispose are those which the appellant has preferred in two out of seven suits instituted by him in order to recover a large quantity of alluvial land lying now to the south of the Ganges, and accordingly transferred by order of the Government from the zillah of Ghazee-pore

<sup>1</sup> Sir JAMES COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and ROBERT P. COLLIER.

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to that of Shahabad. Notwithstanding the great volume of the record, and the number of the proceedings contained in it, the facts essential to the determination of these appeals may be brought within a narrow compass. It appears that, at the time of the perpetual settlement, the river Ganges was not only the boundary, as it is still, between the two zillahs of Ghazeepore and Shahabad, but also the boundary between the Mouzah Nowrun-ga, belonging to the plaintiff's ancestor on the left or northern, and a number of mouzahs on the right or southern, bank of the then channel of the river, which were settled with other proprietors. Immediately on the southern or Shahabad side of the river, and included in these mouzahs, was an area of low soft land, some six miles wide, favourable to the erratic habits of the Ganges, but bounded on the south by higher or harder land, that opposed itself to the further progress or invasion of the stream in that direction. The precise changes in the course of the river have been proved with greater clearness than is usual in cases of this kind, and are delineated in what has been called the Ameen's Map, No. 7.2. From this and from the evidence it appears that in the year 1839 the river occupied a position considerably to the south of that which it occupied at the date of the settlement, and now occupies; that in 1844 it had travelled to an ascertained channel still further to the south, and in 1857 had for some years reached its southernmost limit, viz., the high or hard bank which has been referred to. It is, moreover, clearly shown that towards the end of the rains of 1857 the river, when subsiding into its cold-weather channel, made a sudden change of that channel, intersecting the land to the north of its former course, and occupying the position designated upon the Ameen's map as "Bhagur 2." Its course, however, in that channel was not permanent; for, either by sudden change or by gradual recession, it travelled still further to the north until it returned to the bed from which it is supposed to have started at some time after the date of the perpetual settlement, being that which it occupied when the decrees under appeal were made.

Upon the sudden change of 1857-8, different persons, claiming to be the owners of some of the villages which had before been diluviated, seem to have taken possession of the land reformed

upon the sites of their old villages, so far as it was then south of the new channel of the Ganges. And when the river went further back, their Lordships presume that other persons similarly claimed and took possession of the additional land that had then become south of the Ganges. The result was that, after some discussion between the authorities of the two zillahs, a *thackbust* was made by the revenue officers of Shahabad in 1864, which apportioned the whole of this disputed land, as re-formation on the sites of the ancient villages, among the representatives of the persons with whom those villages had originally been settled; and confirmed their possession of the plots allotted to them. Between 1858 and this *thackbust* of 1864 there had been various proceedings before the revenue officers of zillah Ghazeepore, at the instance of the plaintiff as owner of Nowrunga, under Act I of 1847; but to these it is now unnecessary to advert. After the *thackbust* of 1864, the plaintiff brought one suit against all the claimants of the disputed land. That was dismissed as improperly framed. He then instituted the different suits, with two of which their Lordships have now to deal. These it will be convenient to call suit No. 2 and suit No. 6; distinguishing them by the numbers whereby the lots claimed in them respectively are described on map No. 7.2, rather than by the numbers which the suits themselves bore in the Indian Court. It lies, of course, upon the plaintiff to prove in each a superior title in order to dispossess the defendants.

Neither party originally put his case precisely in the form in which, after the decision in *Lopez's case*, (13 Moore's Ind. App., 467; 14 W. R., 11, P. C.; 5 B. L. R., 521) and the second remand of the suits by the High Court, it assumed.

Their Lordships propose to treat that second remand as a new departure, and the commencement of the litigation upon which they have to form a judgment. And they may at once state that they cannot concur in the final judgment of the High Court in so far as that casts any doubt upon the propriety of directing the third and fourth of the issues for the trial of which the suits were remanded. The doctrine in *Lopez's case* was doubtless in favour of the defendants in both suits; and, if they had in no way lost their rights, would give them a title to the land re-formed upon

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sites identified by the *thackbust* proceedings of 1864 as within the boundaries of their original mouzahs, which would *prima facie* override a title founded on the principle of the acquisition of that land by the proprietor of the northern bank of the Ganges by means of gradual accretion. Their Lordships conceive, however, that the doctrine in *Lopez's case* (13 Moore's Ind. App., 467; 14 W. R., 11, P. C.; 5 B. L. R., 521) cannot be taken to apply to land in which, by long adverse possession or otherwise, another party has acquired an indefeasible title. In the present suits the plaintiff relies on an alleged adverse possession for more than twelve years of the lands after their re-formation; and therefore the real point to be decided in the suits was whether a title had been thus acquired by the plaintiff, the proprietor of Mouzah Nowrunga.

Now, for the purpose of considering this, which seems to be the only material issue, it will be convenient to travel, as the river originally did, from the north to the south. Their Lordships consider that the point to be determined is whether in 1857 such a new title existed as to all or any of the lands in dispute, because they think it is clearly proved that the change of the river in 1857-8 was a sudden change, which left the rights of the parties as they then existed unaffected thereby. The nature of the change in 1861 is perhaps not so clearly proved. The Zillah Judge certainly found that to have been also a sudden change; for he says that the river began to leave the channel in which it had gone from 1858, in 1267 F. or 1861, and in 1268 F. was found in the place in which it now is—a state of things which implies suddenness of change. Moreover, the evidence, on the whole, preponderates in favour of this last change having been also a sudden change. Their Lordships, however, do not think it very material to find one way or the other upon that point, because even if the river had receded from the channel, marked as Bhagur 2, gradually to the place which it now occupies,—if it had passed, for instance, over Mouzah Sreepore, submerging that mouzah again; the submergence and re-appearance of the land both taking place within the three years,—if that were so, and the question was, who was entitled to the re-formation of the mouzah upon that side of Sreepore, upon this second re-appearance, their Lord-

ships conceive that, according to the strict doctrine in *Lopez's case* (13 Moore's Ind. App., 467; 14 W. R., 11, P. C.; 5 B. L. R., 521), if the plaintiff had, previously to 1857, acquired the proprietorship of that land, it would be he, and not the original owner of Sreepore, who would be entitled to claim the benefit of that doctrine.

Then, going back to the application of the principle which has been already laid down as to the lands in dispute in this case, their Lordships have to consider, first, whether the plaintiff had or had not, in 1857, acquired such a title as has been described to the land north of the river as it ran in the year 1839; and they think that upon the evidence there can be no doubt he had such a title. They rely mainly upon the *thackbust* proceedings of that year. It appears to them clear upon those proceedings and the maps embodied in them, that the land down to the north part of the river as it existed in 1839 was then measured as belonging to Nowrunnga, and in possession of the plaintiff's ancestor; that the greater part of that land was laid out, field by field, as land which had been gained by accretion at that time; and that although there was a small portion which is described in the *thackbust* maps as "registran or sand," that too was measured into Mouzah Nowrunnga and the Zillah of Ghazeepore. No objection or claim seems then to have been preferred on the part of any proprietor on the Shahabad side of the river. And it is clear that the plaintiff and his ancestors were afterwards, and up to 1857 or 1858, in possession of this land; that is, for a period of about eighteen years.

The whole of the land in dispute in suit No. 6 falls within the boundaries of Nowrunnga as thus defined in 1839. In that suit, it has been attempted at the Bar to raise some contention on the supposed effect of the confiscation of Koer Singh's estate, of which Mouzah Sreepore once formed part. But that is a point that never seems to have been raised in the Court below; and, so far as their Lordships can see, there can be no ground for the contention. It seems to them that the whole of this lot must have been diluviated, and that, when left dry as the river receded still further, it was assumed to have become by accretion part of Nowrunnga. It was measured as such in 1839; and, if the second change of the

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river in 1861 was a sudden change, that land has ever since 1839 been dry land, and was up to 1861 in the possession of the plaintiff. Again, if the changes in the course of the river between 1858 and 1861 were not sudden, but gradual, the subsequent diluviation and re-appearance of the land could not, as has already been stated, defeat the title to the site which the plaintiff had gained before 1858. These considerations suffice to dispose of the appeal in suit No. 6.

With respect to the appeal first heard, that in the suit No. 2, the case is different. In order to substantiate the whole of the plaintiff's claim, it would be necessary to show that in 1858 he had been in possession of this land, almost up to the extreme southern boundary, for more than twelve years. Now their Lordships have felt no hesitation in concurring with both the Courts, in so far as they have found that no such title was established to land beyond the course of the river in 1844. There is no clear evidence how, or in what particular year, that land accreted; and it is impossible to say that there has been a possession for twelve years, or any possession that would be sufficient to defeat what is *prima facie* the superior title of the defendants. Their Lordships have had more doubt as to the land lying between what was the northern bank of the river in 1839, and that which was its northern bank in 1844; but, even if they had been disposed to agree with the Zillah Judge in respect of this land, they could not have concurred in his judgment in so far as it gives to the plaintiff the bed of the river as it existed in 1844, and carries his boundary up to what was then the southern bank of the river. Although in the case of a wandering and navigable stream like this, the bed of the river may be said temporarily to belong to the public domain, that state of things exists only while the water continues to run over the ground; and it clearly appears on the face of the *thackbust* map of Mouzah Sohia, which was made in the course of the survey of 1844 (and these proceedings are the strongest evidence, such as it is, which the plaintiff has given of his possession of the land now in question), that some land which had once formed part of that mouzah was then on the northern bank of the river, and consequently that the ground over which the river then ran had also been part

of Sohia; and if this be so, when the bed of the river became dry, the right of the defendants to the new formation on that site would attach, and there is no proof of a length of possession of that re-formation which would defeat their title.

The point upon which their Lordships have felt greater difficulty is, whether there was not sufficient proof of possession for twelve years, on the part of the plaintiff, of the land up to the northern bank of the river as it ran in 1844. It has been argued that the *thackbust* proceedings of 1844-5 were as strong to prove the possession of the plaintiff or his ancestor of the land north of the river as it then ran, as were those of 1839 to prove his possession of the land within the boundary then laid down, up to the line of the river in 1839. Their Lordships, however, do not think that this is so. The later *thackbust* proceedings related to Mouzah Sohia, and were made in Shahabad, and the river was then the boundary, not only of the Zillah of Shahabad, but also of two provinces under distinct Governments, viz., the North-West Provinces and the Lower Provinces of Bengal. The authorities of Shahabad presumably had no authority to carry their *thackbust* beyond the southern bank of the river as it then ran. Again, upon the face of the *thackbust* map is the statement already referred to, wherein, after mentioning that the entire area of Sohia had been 2,451 beegahs, but that out of that only 400 beegahs existed which were under cultivation, (that being, as their Lordships understand, the portion of Sohia that was then on the south side of the river,) it is stated: "The remaining land," that is, 2,051 beegahs, "was washed away by the "Ganges, and has now accreted on the north side of the River Ganges in a small quantity, and consists of sand." Therefore that which was out of the bed of the river on the northern bank seems to have then been, according to this statement, waste uncultivated land, over which no acts of ownership had been exercised, and in which the possession or the right of the plaintiff had been positively affirmed by no measurement on the other side of the river. The doubt their Lordships have had is whether there was no other evidence, from which it might be properly inferred that cultivation had afterwards been extended and acts of ownership exercised over this land by the plaintiff between 1845 and 1857,

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without question, so as to establish an adverse possession of it as against the defendants for twelve years. But, upon the whole, looking to the uncertainty of the general evidence as to this strip of land, to the not very clear finding of the Zillah Judge regarding it, and to the fact that much better evidence as to payment of the rent and the like might have been given than was given, they have come to the conclusion that they have not sufficient grounds before them for disturbing the finding of the High Court upon this part of the case. The plaintiff, therefore, must be taken to have failed to have made out a sufficient title to any land which was not north of the river as it ran in 1839.

The result is, that in suit No. 6, in which all the land claimed lies above the line of 1839, their Lordships must humbly advise Her Majesty to reverse the decision of the High Court in that suit, and to affirm the decision of the Zillah Judge, with the costs of the appeal in the High Court. When they delivered judgment, they proposed to advise Her Majesty to dismiss the appeal, and to affirm the decision of the High Court in suit No. 2, inasmuch as they then understood that all the land claimed in that suit lay below the line of 1839. It having, however, been brought to their notice before the report was drawn up, that, notwithstanding the statement of the Zillah Judge to the effect that no part of the land north of that line was in question in the suit, the maps which are in evidence in the cause, and particularly the Ameen's map No. 7.2, afford ground for believing that a small portion of the land claimed, being part of that in the possession of the defendants as their Mouzah Pursownda, is, in fact, above the line of 1839; the order which their Lordships will recommend Her Majesty to make in this suit is, "that the decree of the High Court be varied, by declaring that the plaintiff is entitled to recover, and ordering that he do recover, so much (if any) of the land claimed by him in this suit as lies to the north of the line delineated in the Ameen's map No. 7.2, as the northern bank of the river Ganges in the year 1839; the amount (if any) of such land to be ascertained, in case of dispute, by proceedings in execution; but that in all other respects the decree of the High Court be affirmed." This order seems to their Lordships calculated to assure to the plaintiff, with the least risk of future

litigation, that to which he may be entitled upon the principle laid down by them in their judgment. But, considering the manner in which the question concerning this, at most inconsiderable portion of the land in dispute has been brought before them, they do not think it would be right to make any order touching the mesne profits of what may be recovered, or to vary the decree of the High Court as to the costs of the litigation. They think also that the plaintiff ought to pay the costs of the appeal to Her Majesty in this suit. The respondents in suit No. 6 must pay the costs of the appeal in that suit.

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Judgment.

## [CRIMINAL REVISIONAL JURISDICTION.]

1877.  
March 29.

IN THE MATTER OF UMBICA PROSHAD . . . PETITIONER.

*Section 505, Code of Criminal Procedure—Object of Chapter XXXVIII.*

The object of Chapter XXXVIII, Code of Criminal Procedure, is the prevention not the punishment of crime. When a charge of a specific offence is under trial, proceedings under Chapter XXXVIII should not be instituted.

*Juggut Ohunder Chuckerbutty* (I. L. R., 2 Cal., 110), followed.

**T**HIS was an application to the High Court, as a Court of Revision, to set aside the orders passed by the Magistrate of Shahabad on appeal, confirming the order of a Deputy Magistrate, which required security for good behaviour from the petitioner, under section 505, Code of Criminal Procedure.

Mr. *H. E. Mendies* and Baboo *Mohesh Chunder Chowdhry*, for Petitioner.

The facts of this case are sufficiently set forth in the judgment of the High Court,<sup>1</sup> which was delivered by

MACPHER-  
SON, J.

MACPHERSON, J.:—

The state of things disclosed by the records which are before us is, to say the least of it, very remarkable. The Deputy Magistrate of Arrah has, under section 505 of the Criminal Procedure Code, directed the petitioner Umbica Proshad Singh to furnish "security of Rs. 20,000, in four sureties of Rs. 5,000 each, to be of good behaviour for the period of one year; in default, to be imprisoned for the same period, the first two months simply and the remaining ten months rigorously." From this order the petitioner appealed to the Magistrate, but without success. We are now asked, in the exercise of this Court's powers of revision, &c., to set aside this order.

<sup>1</sup> MACPHERSON and BIRCH, J.J.

The Deputy Magistrate in his judgment states that it is proved that the petitioner "is the son of Santibilas Singh, a rich Zemindar in the District of Shahabad, residing in Mouzah Chowgain; that both father and son are known to be among the Chowgain baboos, a family well known in this district."

One Bisheshur was arrested on a charge of robbery in the beginning of 1876, and on the 16th January 1876 made certain statements to the Magistrate admitting his having been concerned in a dacoity in the Mozufferpore and Hajipore road, in March 1872, and also in several other dacoities. Six months afterwards this Bisheshur, having been in jail all the time, on the 10th of July made a further statement before the Magistrate, and in that he, for the first time, mentioned the name of the petitioner (Umbica Proshad Singh), alleging that on a certain occasion, some three or four years previously, he had received stolen goods.

Upon this statement being made, the petitioner was arrested and charged before the Deputy Magistrate with having received stolen goods. At first he was kept in prison, bail being refused. But, on an application being made to the High Court, it was ordered that he should be released on giving suitable bail. This order was made on the 10th of August. It reached the District Magistrate on the 12th, and was communicated to the Deputy Magistrate by an order of that date. The petitioner was then released on bail. But, before the petitioner could reach his house, the police, on the 15th of August, made a report that he was of bad repute, &c., and the proceedings out of which the present application arises thereupon commenced. These proceedings remained pending till the Deputy Magistrate, on the 18th of November, made the order complained of, and witnesses (sixteen for the prosecution and thirty-five for the defence) were examined on three or four days in August, six days in September and two days in October.

About the same time that the order under section 505 was made (apparently on the 18th), the Deputy Magistrate committed Umbica Proshad Singh to take his trial at the Sessions on the original charge of receiving. On the trial on the 27th November, the petitioner was acquitted. The Sessions Judge says in his

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—  
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—  
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judgment that there was no evidence whatever against the accused (Umbica Proshad) save the uncorroborated statement of the approver, Bisheshur, and he adds that he does not believe that Bisheshur's statement is true, and gives his reasons for that opinion.

We are particular in referring to the judgment of the Sessions Judge, because the Magistrate, in dismissing the appeal against the order under section 505, speaks of the petitioner having been discharged, as the Sessions Judge was not satisfied with the evidence of Bisheshur, because uncorroborated. This scarcely represents accurately what the Judge said, for he not only distrusted Bisheshur's deposition because uncorroborated, but said that he thought the deposition quite unreliable in itself, and that he did not believe it.

But the petitioner, who has been tried and acquitted so far as concerns the only specific charge which has been made against him, still remains liable to the order that he shall find four sureties in Rs. 5,000 each or be imprisoned for a year, during ten months of which the imprisonment is to be rigorous. This matter not being before us by way of appeal, we do not discuss the details of the evidence. It is impossible to say there is no evidence to support a charge under section 505, though what there is, is of the loosest and worst description. And the Deputy Magistrate believing it, and discrediting the thirty-five witnesses to character called by the accused, has found as a fact that the accused is of evil repute as regards almost every one of the matters specified in section 505.

The Deputy Magistrate says that both father and son are known by repute to be notorious *thangidars*, or receivers of stolen property, and to entertain notorious budmashes of the worst type; that both father and son are in the habit of sending out the budmashes to distant parts of the country to commit theft, &c., and on their return to receive the stolen property brought by them. And this disgraceful state of things (he says) is found to have existed for a very long time. Further, he finds that, "besides evidence of a general nature to prove that Umbica Proshad has a repute which extends rather widely of being *thangidar*, there is evidence of a specific nature which proves the disreputable notoriety the family have gained in the district;" and again he states it is proved "that

at one time the father of Umbica Proshad invited dacoits, to be avenged on a man whom he bore a grudge." Finally he says, "he makes the order under section 505" on a consideration of the above, and the records of the several cases of bad livelihood filed in evidence in which the names of Chowgain Baboos figure in connection with the bad characters who have been convicted therein.

One thing is very clear on the face of the Deputy Magistrates' judgment, that if the conduct of the petitioner has been for many years past such as he finds it was, it says but little for the police of the district that Umbica Proshad has been at large so long. And it is to be hoped that before accepting as true all that was said by the policemen who were examined, the Deputy Magistrate duly considered the improbability of their having kept quiet all these years had they really known all that they now say they knew.

But it seems to us that the order of the Deputy Magistrate is bad and must be quashed,—the whole proceeding being a most arbitrary and entirely wrong use of the powers entrusted to Magistrates by Chapter XXXVIII of the Criminal Procedure Code. The object of that Chapter is the prevention, not the punishment of crime, and with that object it authorizes Magistrates to take from certain persons good and sufficient security for their good behaviour. But it is solely for the purpose of securing future good behaviour that section 505 can be used; and any attempt to use it for the purpose of punishing for past offences is wrong and not sanctioned by the law.

Now, what were the circumstances under which this proceeding was instituted and this order made? Throughout the whole time from instituting the charge under section 505 on the 15th of August, up to the making of the order on the 18th of November, the petitioner was under prosecution on a charge of receiving stolen property with a guilty knowledge. On the latter charge he had been under arrest for some weeks, and bail having been refused by the Magistrate, he was released only by the order of this Court directing his release on giving sufficient bail. The moment that the order for this release on bail was received, the proceedings under section 505 were commenced. Now, when the accused was being actively prosecuted on a substantive charge, and he had given bail which the Magistrate deemed sufficient for his appearance when required, what possible necessity or

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justification was there for proceeding simultaneously under section 505? Such a thing never was contemplated by Chapter XXXVIII, and in no way falls within the spirit of that Chapter. Had the Magistrate, when the case at the Sessions broke down and the accused was acquitted, deemed it necessary to institute proceedings then under section 505, the case might possibly have been different. But, on proceedings so instituted, the petitioner's position would have been far better than it was prior to his acquittal and when the trial on the specific charge of receiving was hanging over his head.

Again, the order made is an order not made in any reasonable exercise of the large discretion vested in Magistrates by Chapter XXXVIII. The Deputy Magistrate says the petitioner is one of "the Chowgain Baboos," and is the son of a wealthy zemindar; and because he is a man of position and means, he directs him to find security in the exceptionally large sum of Rs. 20,000, i. e., four sureties, each in Rs. 5,000, sentencing him in default to one year's imprisonment, of which ten months are to be rigorous. It is true that by section 510, the imprisonment may be rigorous or not, as the Magistrate may in each case direct. But where, in the case of a man who has never been convicted of any offence, the Magistrate orders that security shall be given of a description which it must necessarily be difficult to find, and directs that in default of giving the security the imprisonment shall be rigorous, it appears to us that such an exercise of his discretion is wholly unreasonable and bad, especially when the Magistrate indicates no reason why, with a view to the prisoner's future good behaviour, it is desirable that the imprisonment shall be of the more severe kind.

Altogether it is quite clear that these proceedings under section 505 are entirely mistaken and bad. They either were illegally and wrongly instituted for the sole purpose of securing at all hazards the punishment of the petitioner, or there was an utter and fatal want of discretion in their institution, and in the order made. We think the case falls within the rule acted upon by the Court in the case of *Juggut Chunder Chuckerbutty* (I. L. R., 2 Cal. 110), and that the order of the Deputy Magistrate must be quashed. If the petitioner is in custody, he must be released at once.

## [CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF RAJA LEELANUND } PETITIONER. 1877  
November 29.  
SINGH, BAHADOOR . . . . . }

*Section 531, Code of Criminal Procedure—Doubtful Possession—Section 530—Interpretation of decrees of Civil Court.*

The doubt upon which a Magistrate can act under section 531, Code of Criminal Procedure, must arise from his inability to decide on evidence offered by the contending parties as to their possession and not on a doubt entertained without such inquiry.

A Magistrate, acting under section 530, cannot interpret the meaning of a decree of a Civil Court. He can determine only the fact of actual possession.

THIS was an application to set aside two orders of the Magistrate of Monghyr, passed under sections 530 and 531 of the Code of Criminal Procedure. It appears that some dispute arose between Raja Leelanund Singh and the Manager under the Court of Wards of the Durbungah Estate, regarding possession of certain lands, and whether they formed the subject of a decree given by Her Majesty's Privy Council in a suit between these parties. The Magistrate of Monghyr thereupon, on the application of the Manager, issued a notice on the Raja calling upon him to show cause why he should not, under section 531 of the Code of Criminal Procedure, attach it until the matter was decided by a competent Civil Court, and finally on July 4th he did so attach the lands in dispute.

On the 26th July the Magistrate recorded that, "as there seemed to be some doubt as to which party was in possession, and there seemed to be no adequate means of determining it, this Court took possession under section 531, Code of Criminal Procedure, to prevent a breach of the peace."

He then proceeded to consider the course of litigation in the Civil Courts between these parties, the result of which in his opinion showed that the Raja was not in possession, and he accordingly ordered the police to give possession to the Manager of the Court of Wards.



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SINGH,  
BAHADUR,  
Petitioner.—  
*Argument.*

*Paul* (Advocate-General), and *Mr. R. E. Twidale*, for the Petitioner.

The order of the Magistrate under section 531 is *ultra vires*; and, if it be a legal order, the Magistrate was not competent to withdraw it, and to give possession to the Manager of the Court of Wards until the matter was decided by a competent Civil Court. The Magistrate was not competent to review the litigation between the parties relating to the title of the parties and to decide on what he considered to be the result, but he should have decided only the matter of actual possession which the proceedings in execution of the decree of the Privy Council showed to be with the Raja.

Baboo *Annoda Proshad Banerjea* and Baboo *Jugdanund Mookerjee*, for the Opposite Party.

The judgment of the High Court<sup>1</sup> was delivered by

JACKSON, J. JACKSON, J. :—

Both the orders of the Magistrate in this case must be set aside : the first, because it was passed without enquiry and not under circumstances which would justify such an order. As the order was originally made, it purported to proceed upon the fact that the suit was going on in the High Court. That is no ground for such an order. The Magistrate afterwards desires to explain it as being justified by a doubt as to where possession rested. But the Magistrate is not competent to recite a doubt in his mind regarding any specific property, and thereupon immediately to attach that property. The doubt must be the result of his inability to determine upon the evidence offered by both parties, and thereupon he may proceed to attach. As to the second order, it clearly proceeds upon the Magistrate's interpretation of a decision of a Civil Court. That is no ground for the determination of the Magistrate under the section. He is bound to enquire into possession, and *that* alone. Both of these orders, therefore, are made without authority, and must be set aside.

<sup>1</sup> JACKSON and McDONELL, J.J.

## [EXTRAORDINARY CRIMINAL JURISDICTION.]

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June 23.

## THE EMPRESS vs. MUKHUN KUMAR.

*Section 263, Code of Criminal Procedure—Verdict of Jury—Dissentient opinion of Sessions Judge—High Court.*

*PER CURIAM*.—A very large discretionary power is vested in the High Court by section 263 of the Code of Criminal Procedure. No fixed rules can be laid down for the exercise of that discretion in every instance; and the decision in each case submitted must depend upon its own peculiar circumstances.

*PER GARTH, C.J., and PRINSEP, J. (MARKBY, J., contra)*.—The rule laid down in *Queen vs. Wasir Mundul*, 25 W. R., 25, Criminal Rulings, goes too far.

*PRINSEP, J., (MARKBY, J., contra)*.—The law does not prevent a Sessions Judge from asking a Jury regarding the grounds for their verdict, and such a course is desirable in the ends of justice. See *Queen vs. Sustiram Mundul*, 21 W. R., 1.

THIS was a case tried by Jury in the Sessions Court of Burdwan. The prisoner was charged with the murder of his brother, and was acquitted by the unanimous verdict of the Jury. The Sessions Judge disagreed with this verdict and submitted the case under section 263 of the Code of Criminal Procedure for the orders of the High Court.

No one appeared for the prisoner.

The case was originally heard by MARKBY and PRINSEP, J.J.; and, as they differed in opinion, it was re-heard by the same Judges sitting with GARTH, C.J.

The facts of this case will sufficiently appear in the judgments delivered :

MARKBY, J. :—

MARKBY, J.

In this case the prisoner's brother was murdered in his own house in the night. The only person residing with him was the

<sup>1</sup> GARTH, C.J., MARKBY and PRINSEP, J.J.

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prisoner. The prisoner himself, at an early hour, gave information of the murder to several persons in the village, including the village gomastah. The prisoner at first said that he did not know who had committed the murder, but on coming before the gomastah he charged Hera Lall (a neighbour) and Ramanath with having committed it. This same Hera Lall states that, on the night of the murder, the prisoner came to his house, and, standing outside, called out that he had killed his brother, and asked Hera Lall to assist him in concealing the body. This is corroborated by Hera Lall's two sisters, who were in another house four or five cubits distant, and who say they heard what the prisoner said.

Upon the evidence as recorded, there is, as it appears to me, a direct contradiction between Hera Lall and the gomastah as to whether Hera Lall reported this conversation to the gomastah immediately. But the Jury seem to have thought that the gomastah said that Hera Lall told him of this conversation afterwards. There is also, in my opinion, considerable improbability that a man who had committed a murder should communicate it to a neighbour in the manner described by Hera Lall. It was not unlikely that the prisoner, if he committed the murder, would ask Hera Lall to assist him in disposing of the body; but he would, in all probability I think, have gone inside the house to make this request, and would have taken care not to be overheard. The Jury, therefore, had, as far as I can see, reasonable grounds for disbelieving the story told by Hera Lall.

The other evidence in the case consists of the confession of the prisoner and the evidence of the lad, Denonath, who says that, on the day preceding the murder, the prisoner borrowed from him an axe belonging to his uncle. There is no doubt that with this weapon the murder was committed. No one could have complained if, upon the confession thus corroborated, the Jury had convicted the prisoner, but they did not do so. They unanimously acquitted him.

The question for me is whether I am to say the prisoner is guilty in the face of this unanimous verdict of the Jury. I have not heard the witnesses and cannot judge of their demeanour. The case, as I look at it, is essentially one for the considera-

tion of a Jury. It depends mainly upon whether the prisoner's confession ought to be accepted as true. There can be little doubt that, if the Jury rejected the confession of the prisoner, they did so because they suspected it might have been made under the influence of the Police. With great deference to the opinion of the Chief Justice, I think the Jury had a right to consider whether it was probable that this confession was due to the influence of the Police, though there was no direct evidence of it. I think there would be great danger if this view of the matter were not considered open in every case. It is certainly not too much to say that the police possess great influence over the prisoners in their charge, and that they do sometimes obtain the most circumstantial confessions which are false. A remarkable case of the kind will be found in 7 W. R., Cr., 3, and I have now before me the recorded opinion of a Sessions Judge of great experience, that witnesses are threatened by the Police in nearly every case which is investigated. If witnesses are threatened, there can be little doubt that accused persons in custody are threatened also. I think, therefore, that the Jury have a right to accept every confession coming from persons who have been in the custody of the Police with caution, and with a regard to the probability of its having been made under the influence of the Police ; and a Jury is, in my opinion, better qualified than I am to judge how far this caution is to be carried, and to determine whether a confession is to be accepted in any particular case. I do not, therefore, feel justified in saying that the Jury could not reasonably have arrived upon this evidence at a verdict of acquittal.

With regard to the duty of Judges of this Court, in dealing with the verdict of a Jury referred under section 263, I agree that the words of that section leave the discretion of the Judges uncontrolled, and that we cannot lay down any fixed rules for the exercise of that discretion according to one's own conscience. At the same time, I agree generally with, and adhere to, the observations made by PHEAR and MORRIS, J.J., in 21 W. R., Cr., 4 ; by MACPHERSON and MORRIS, J.J., in 20 W. R., Cr., 73 ; by BIRCH, J., and myself in 20 W. R., Cr., 33 ; by MACPHERSON and MORRIS, J.J., in 25 W. R., Cr., 25 ; and by the

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High Court of Bombay. No doubt these observations cannot amount to more than an expression as to how the particular Judges who made them thought their discretion ought to be exercised. But dealing, as I am now, with a case of a unanimous verdict of acquittal, I adopt those observations as my guide; and what they amount to is well expressed by the Bombay High Court, that we ought not, as a general rule, to interfere, under section 263, with the verdict of a Jury, unless it is perverse and patently wrong. Of course, I am here supposing that the verdict of the Jury has been arrived at legally and properly. In the present case, there is no suggestion of any impropriety or illegality in the verdict of the Jury. It seems to be impossible to admit the supposition that the Jury are not fit to perform their duty. They have declared unanimously that, in their opinion, the prisoner is not guilty; and I do not feel justified in saying that that verdict should not be recorded.

As regards the power of this Court to order a new trial in a case referred under section 263, I do not wish to say anything, as I understand that course would not be taken in this case even if the power exists. Nor, as at present advised, am I prepared to recommend that Juries should be questioned by the Judges as to the grounds upon which they base their conclusions.

GARTH, C.J. GARTH, C.J. :—

After a careful consideration of this case, I have come to the conclusion that, notwithstanding the verdict of the Jury, we ought to convict the prisoner of murder. If he be guilty at all, there can be no doubt as to the quality of the offence. The deceased was barbarously murdered by some one; and the question, if question there be, is, whether the prisoner is the guilty man.

Now the evidence in the case consists in great measure of a confession made by the prisoner himself before the Magistrate of Burdwan on the 1st of March last.

From that statement, and from the admitted facts of the case, it appears that the prisoner was the younger brother, and that the two brothers lived together in one small house. Very near them lived a man named Hera Lal and his two sisters, named Sarasvatee and

Bidhoo, with whom the prisoner and his brother seem to have carried on an illicit intercourse. The deceased, the elder brother, had consorted with Sarasvatee, the elder sister, for several months, when he left her for the youngest sister Bidhoo, still visiting the elder one occasionally. The prisoner, then a young man of seventeen or eighteen years of age, used to consort with the elder sister; and this community of intercourse appears to have led to quarrels between the brothers.

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On Saturday, the 24th of February last, both brothers were in the early part of the day at the market; and a dispute arose between them with reference to some pice which the deceased had given to the prisoner, and which the latter seems not to have accounted for. According to the prisoner's statement, he was severely scolded by his brother for concealing these pice, and on the following morning (Sunday) he, the prisoner, borrowed an axe from a neighbour, Jadoobun Tantee, and placed it beside the door of their house. On the evening of that day he had a conversation with Sarasvatee, who, he says, advised him to kill his brother, suggesting that, if the brother were dead, she and the prisoner might live together comfortably. The prisoner then states that he and his brother went to sleep as usual in the same house; and that, after his brother had risen at midnight to see an eclipse of the moon and had laid down to sleep again, he, the prisoner, took the axe and struck him with it three or four times on the head. His brother died without a word. He then went to the house where Hera Lall and his sister lived, told them what he had done, and begged Hera Lall to help him to bury the body. Sarasvatee went with him to look at it, and Hera Lall advised him to go to the gomastah of the village and say what he had done. He appears first to have gone to one or two other persons, and told them that his brother was murdered, without mentioning who had committed the murder; and he then went to the thannah with the peon early in the morning of the 26th of February, when he told the gomastah that Hera Lall and Ramanath (a friend of Hera Lall's) had murdered his brother.

These circumstances are for the most part detailed in the prisoner's statement before the Magistrate, in what appeared to me the most natural and circumstantial manner, with these remark-

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GARTHE, C.J.

able words, "but God knows that I am the murderer, and only I." The Magistrate observes upon this:—

"N.B.—The accused, a slight miserable looking youth, raises both his hands up in an earnest manner in saying this, a statement which he seems to make with all sincerity."

This confession of the prisoner is corroborated most fully and satisfactorily, as it seems to me, by the evidence adduced for the prosecution. Hera Lall states that the prisoner came to his house soon after midnight on the night in question, and told him, from outside the door, that he had killed his brother, and begged him to come and help to bury him. The sisters Sarasvatee and Bidhoo confirm Hera Lall's statement, and also speak to the circumstances which led to the quarrel between the two brothers; and, lastly, Jadoobun is called, the neighbour from whom the axe was borrowed, and he confirms the prisoner's statement in that respect. There is not the least doubt that this axe was the instrument with which the murder was committed. The deceased's head was cut in such a manner as could only have been the result of cuts by some such instrument; and the axe, covered with blood, was lying by the side of the deceased. The surgeon's evidence is, to my thinking, conclusive upon this point.

Then, here we have a complete circumstantial and apparently genuine confession of the offence by the prisoner. The Magistrate before whom it was taken is convinced of its truth and sincerity. That confession is confirmed by what seems to me perfectly reliable evidence. The Sessions Judge has recorded his opinion that the verdict of the Jury is wrong; and I confess it appears to me almost impossible to account for the verdict of the Jury upon anything like reasonable grounds.

It is true that the prisoner, on the morning of Monday, the 26th, laid the blame upon Hera Lall and Ramanath, and that he afterwards repeated that charge before the Sessions Judge; but he said on that occasion that he never made the statement at all before the Joint Magistrate, which was taken down from his own lips, and also that what he did say was suggested to him by the Police.

I confess I cannot see the slightest ground for believing this statement of the prisoner; and it is quite uncorroborated by any

evidence in the case. We have nothing before us, nor had the Jury any evidence before them, to induce the belief that the Magistrate made any mistake, or that the prisoner's confession was extorted from him by improper conduct on the part of the Police; and in the absence of such evidence, I cannot think that we have any right to assume that either the Magistrate or the Police were guilty of any breach of duty. In this respect, I quite agree with what is said by Mr. Justice MACPHERSON in the 25 W. R., Criminal Rulings, 26. It is difficult, no doubt, to account for the conclusion at which the Jury arrived. They do not appear to have thought anything of the supposed contradiction between the evidence of Hera Lall and of the gomastah, to which my learned brother Mr. Justice MARKBY appears to attach some weight; nor, as far as I can discover, is there any reasonable ground for their disbelieving the prisoner's confession or the other evidence in the case. It is very possible, as has been suggested by my learned brother, Mr. Justice PRINSEP, that they may have been influenced by what seems a too prevalent notion, namely, that no conviction for murder is justifiable without the evidence of some eye-witness of the crime; and the summing up of the learned Judge, at the trial, seems to point to some such difficulty. But whatever the causes operating upon the mind of the Jury may have been, I myself cannot see any reasonable grounds for their arriving at the verdict of acquittal.

In the consideration of this case two questions have suggested themselves to my learned brothers and myself, which appeared to be of very general importance:—First, how far this Court is justified, in a case referred under section 263 of the Criminal Procedure Code, in convicting a prisoner contrary to the express and unexplained finding of a Jury; and, secondly, whether this Court has power under that section to order a new trial.

With regard to the first of these questions, it appears to me that, by that section, the Legislature intended to vest in the High Courts a very large discretion; and that it would be improper for us, if not impossible, to lay down any fixed rule by which that discretion should be controlled. The verdict of a Jury, who are the legally constituted judges of facts, and have the advantage of seeing the case tried and of hearing the witnesses examined, ought

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always, in my opinion, to command its proper weight; and the more unanimous their verdict may be, and the less likely to have been induced or influenced by prejudice or error, the more entitled it should be to our respect and consideration. But there may be many occasions where, as it seems to me, little or no weight should be attached to their verdict; as, for instance, where, out of a Jury of five, three are of one way of thinking and two of another, and the presiding Judge agrees with the minority, or where it is manifest, from the conduct of the Jury or otherwise, that their minds have been influenced by a prejudice which has prevented them from forming a correct judgment.

In the exercise, therefore, of my own discretion in cases coming before us under this section, I should not go so far as to hold with Mr. Justice MACPHERSON and Mr. Justice MORRIS, (in 25 W. R., Criminal Rulings, 77,) that "the verdict of a Jury should not be interfered with, except where there is a gross and unmistakeable miscarriage of justice;" nor, on the other hand, should I consider myself justified in deciding any case according to my own views of the evidence, without giving to the verdict of the Jury its proper weight. Each case, in my view of the section, should depend on its own circumstances.

As regards the power of the Court to grant a new trial, I am inclined to think, as at present advised, that they have no such power. The language of the section appears to mean that, where the verdict of the Jury is not in accordance with the opinion of the Judge, it should be referred to the High Court, upon consideration of the whole case, law and fact, and with due regard to the finding of the Jury, to determine the question finally. It is remarkable, as observed by my brother, Mr. Justice PRINSEP, that the present Code of Criminal Procedure, as passed in 1872, contains no provision for the re-trial of an appeal, and that it is only by the addition to section 280, (introduced by section 28, Act XI of 1874) that the power now exists in an Appellate Court "to order the appellant to be re-tried;" and that, though some parts of section 263 were amended at the same time, no special provision was made for extending the power to order a re-trial to cases submitted to the High Court under section 263. In other parts of the Act, of such a power is intended to be exercised, it is given

express terms. (See sections 272, 284, 297, 299 and 448 of the Criminal Procedure Code.) Moreover, it will be found, that in this section the High Courts are empowered to decide the case finally, without reference to the particular charge upon which the prisoner was formally tried in the Court below ; and it seems clear that this provision would not be applicable to a case sent back for re-trial.

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In this particular case, I confess I should not be disposed to send back the case for re-trial, even if we had the power to do so. There appear to me very cogent reasons against such a course.

PRINSEP, J. :—

PRINSEP, J.

In this case, in which there can be no doubt that a man has been murdered in a most deliberate and brutal manner, the accused has been acquitted by an unanimous verdict of the Jury ; but the Sessions Judge who presided at that trial has disagreed with that verdict, and has submitted the case to the High Court under section 263 of the Code of Criminal Procedure.

The Sessions Judge, in recording the grounds of his opinion for submitting the case (section 464) has stated, "I do not think it necessary to add any thing to the evidence as it stands on the record, and to my summing up, except to say that to my mind there appears to be no reasonable doubt that the prisoner committed the murder."

We have no means of learning the grounds on which the Jury came to an unanimous verdict of acquittal. We must, therefore, assume that the Jury either wholly disbelieved the evidence on the record, or that they considered it as insufficient to establish beyond all reasonable doubt the prisoner's guilt.

I can find no good reason for either of these opinions.

The prisoner confessed in a full and circumstantial manner to the committing Magistrate, his personal demeanour as then recorded was remarkable, and when the confessional statement was read over to him he appears to have interposed an additional statement on a point, thus showing that he was fully cognizant of the proceedings then being taken, that that statement of the course of events emanated from himself, and that it was a true statement of what had occurred.

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So far as the facts stated on that confession could be confirmed, they have been confirmed by the evidence of the witnesses. There certainly is the apparent contradiction noticed by Mr. Justice MARKBY, but to me this is susceptible of explanation, and it is shown from the record of what took place when the Sessions Judge proposed to clear this contradiction by calling other witnesses, that the Jury not only attached no importance to it, but considered that the statements made by Hera Lall and the gomastah were not really contradictory.

I see nothing absolutely improbable in the prisoner's going to Hera Lall after committing the murder. He went to ask for Hera Lall's assistance to hide the body under the ashes in the furnace house of his pottery ; and, if we believe his own statement that he was induced by one of Hera Lall's sisters to commit the murder, the fact of his going there receives a further explanation.

That he subsequently denounced Hera Lall as the murderer is accounted for by the Sessions Judge as the result of deliberation after an interval to collect his thoughts, but his acts between going to Hera Lall and the gomastah seem to be more consistent with his own guilt rather than with the truth of his suspicion of Hera Lall. His first object seems to have been to get out of trouble himself, and then, when he had recovered from the shock of his crime, to accuse another, the nearest neighbour, and one who had declined to help him out of the difficulty. There is, moreover, no apparent motive on the part of Hera Lall to commit this offence, for his sisters had for some time been living with the two brothers without any remonstrance on his part. It is suggested that the Jury disbelieved the prisoner's confession made to the Magistrate but denied on the Sessions trial. If they did so, in my opinion they acted most capriciously, and not in the proper exercise of their duty. I have already stated on what grounds the confession bears the impress of truth. That it was voluntarily made has been certified by the Magistrate, and this is also borne out by the prisoner's own demeanour to which I have adverted. But in the Sessions Court the prisoner said, "I did not say to the Magistrate a word of what I have now heard read. They (the Police) tied and beat me, and tutored me what to say."

The reported cases of this country may occasionally show

instances of false or extorted confessions, and to us, who are strangers, it may seem highly improbable that any confession should be voluntarily made so soon after the commission of a crime; but in my opinion we are not therefore justified in discarding every confession that may be made on hypothetical grounds of improbability or of its having been improperly obtained, when, opposed to such grounds, we have tangible evidence of its truth and of its having been voluntarily made. No doubt, the frequency of confessions in this country has made the people, and those who are concerned in the administration of justice as Judges or Jurors, disinclined to attach that weight to them which they would otherwise be entitled to receive; but when there is on the face of a confession, as there is in the present case, evidence of its being a truthful and voluntary confession, and when it is corroborated by all the evidence which the nature of the case admits, I think that the verdict of a Jury in disregarding such confession is a wrong verdict, and that in the ends of justice that verdict should not receive its ordinary legal effect.

I am inclined, however, from a long experience of trials by Jury, to attribute this verdict to an idea too prevalent among Jurors in this country, that in cases of homicide the direct evidence of an eye-witness is necessary for conviction; but that is only speculative. In either view of the reasons on which we must assume the verdict was founded, it is, in my opinion, contrary to the evidence which the Sessions Judge has believed, and which I can find no sufficient reason to reject as unreliable.

I am satisfied to accept the rule laid down in the case that each case coming before this Court under section 263 should depend on its own circumstances, as to the weight to be given to the verdict of a Jury from which the Sessions Judge has disagreed. I admit that it is impossible to lay down any inflexible rule on the subject, but I have the strongest objection to assigning any particular grounds for any verdict, the correctness of which is impugned by a Sessions Judge. It would be far more satisfactory if the rule contained in the second clause of section 263 were applied to such cases, so as to enable a Sessions Judge to ascertain the grounds of a verdict before deciding to submit a case to the High Court. He would be better able to decide

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whether the case should be submitted, and the High Court would be in a position to determine whether the verdict was a reasonable or an unreasonable and perverse verdict. I am aware that this proposition is opposed to the opinion expressed in the case reported in 21 W. R., 1 ; but in my opinion the terms of the law do not necessarily exclude this course of procedure, and to me, notwithstanding the objections stated by Mr. Justice PHEAR, it seems highly desirable in the proper administration of justice.

With the opinions of so many learned Judges against me, I submit my own opinion with much diffidence ; but I conceive that, in a case coming before the High Court under section 263, it is the duty of the High Court to weigh the evidence irrespective of the verdict, and it is only when there is some reasonable doubt as to the credibility of that evidence that such a verdict should be accepted. If, however, we had some record of the grounds on which a doubtful verdict was based, we should have no difficulty in dealing with such cases. A comparison between the present and the former Code of Criminal Procedure will show that under the latter the verdict of a Jury was absolute, and that either unanimity or something more than a bare majority of the Jurors was necessary for a legal verdict, whereas the present Code expressly permits the High Court to consider the facts in a case referred for confirmation of a sentence of death, and to take fresh evidence in it, quite irrespective of the verdict of a Jury ; and it has further given power under section 263 to decide a case on the facts, when the Sessions Judge disagrees from a verdict. It seems to me that, by allowing a verdict of a bare majority of the Jurors, by enabling a Sessions Judge to suspend giving effect to a verdict from which he disagrees, by empowering the High Court to convict or acquit irrespective of such a verdict, and by also empowering them to pass final order on a death case on the facts as well as to take fresh evidence, it was the intention of the Legislature to make the full force that would ordinarily attach to the verdict of a Jury dependent on the concurrence, or rather absence of disagreement, on the part of the Sessions Judge ; and that in a case coming before the High Court under section 263 the impugned verdict should receive much less weight than a verdict of a Jury used to receive

under the former Code of Procedure, or now receives in England under the practice of English lawyers.

Whether we could order a re-trial in a case coming before us under section 263, it is not, strictly speaking, necessary to determine; but, after careful consideration of the terms of the last clause of section 263, and an application to it of the several sections relating to appeal, I am of opinion that the opening words of that clause refer merely to the procedure regarding appeals, such as service of notices, whereas the powers of the High Court are defined by that clause itself, and are limited to an acquittal or conviction on the evidence on the record. No good result would, I conceive, arise from any re-trial in such a case on evidence which had become stale, and before a second Jury who could not be otherwise than prejudiced in their verdict by the verdict already delivered on a previous trial.

I concur with the Chief Justice in convicting the prisoner of culpable homicide amounting to murder.

GARTH, C. J. :—

As the majority of the Court is in favour of a conviction, we accordingly find Mukhun Kumar guilty of culpable homicide amounting to murder, by causing the death of Judhisteer Kumar, an offence punishable under section 302 of the Indian Penal Code; and, as there are no extenuating circumstances, we sentence the said Mukhun Kumar to be hanged by the neck until he is dead.

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NOTE.—The judgments of the High Court in this case are of considerable importance, because they have relaxed the rule by which the High Court has hitherto dealt with cases coming before it under section 263 of the Code of Criminal Procedure, and it may not be out of place here to state the nature, the course, and the effect of Legislation in this direction, and the current of the decisions of the High Court.

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In all matters of appeal against a sentence passed by a Court of Session in a case tried by Jury "the appeal shall be admissible on a matter of law only," (section 271 of the Code of Criminal Procedure as enacted by section 22, Act XI of 1874), and this was the rule under the Code of 1861. Under that Code, however, as pointed out by Mr. Justice PRINSEP, "the verdict of a Jury was absolute, and either unanimity or something more than a bare majority of the Jurors was necessary for a legal verdict." The present Code permits the verdict of a bare majority to be a legal verdict, but has placed it in the power of the Sessions Judge to stay execution if he "disagrees" with the verdict of a Jury (unanimous or by a majority) by declaring that under such circumstances he "may submit the case to the High Court," which "shall deal with the case so submitted as it would deal with an appeal, but it may acquit or convict the accused person on the facts as well as law without reference to the particular charges as to which the Court of Session may have disagreed with the verdict." (Section 263 of the Code, and section 21, Act XI of 1874.) In order, therefore, to have a complete verdict of a Jury the Legislature has required the verdict to be unanimous or of a majority either concurred in, or not "disagreed" with, by the Sessions Judge, or that it should be approved of by the High Court on a full consideration of the law as well as of the facts.

The High Court, by a series of judgments which will be cited, has hitherto refused to question the correctness of the verdict of a Jury (of acquittal or of conviction, though with one exception all the cases were of acquittal) unless it could be shown that it was "clearly and patently wrong," notwithstanding that the Court had before it the opinion of the Sessions Judge who presided at the trial that he held that opinion.

In the case of *The Queen vs. Ram Churn Ghose*, 20 W. R., 33, MARKBY and BIRCH, J.J., stated:—"We should not interfere with the verdict of a Jury unless it were established in the clearest possible manner that they had wholly miscarried in their conclusion upon the case. They are the constituted tribunal upon questions of fact in the districts where the Jury system has been introduced, and it will be wholly destructive of that institution if the greatest

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possible confidence is not placed in them." So in the case of *The Queen vs. Sham Bagdee and others*, 20 W. R., 73, MACPHERSON (MORRIS, J., concurring) said: "We ought not to interfere with a verdict unless we can say decidedly that we think that it was clearly wrong. If we are to interfere in every case of doubt, in every case in which it may with propriety be said that the evidence would have warranted a different verdict, then we must hold that real trial by Jury is absolutely at an end, and that the verdict of a Jury is of no more weight than the opinion of Assessors. I presume that, if this were the intention of the Legislature, it would have said so. But the Legislature has not said so. As it is, I consider that the Court should exercise the power vested in it by section 263 only in cases in which it finds the verdict of the Jury clearly and undoubtedly wrong. This is not such a case, although I may admit that there may be room for doubts being entertained as to the facts." Next in the case of *The Queen vs. Hurro Manjhee*, 21 W. R., 4, PHEAR and MORRIS, J.J., expressed entire concurrence with the opinion expressed in the case of *The Queen vs. Nobin Chunder Banerjee*, 20 W. R., 70 (MACPHERSON and MORRIS, J.J.) in which it was stated, "the unanimous verdict of a Jury ought not to be set aside even if the Sessions Judge disagree with it, unless that verdict is clearly and patently wrong and unsustainable on the evidence." The Court added: "If there were any substantial doubt in this case we should certainly not disturb the verdict. It appears to us that there can be no reasonable doubt about this matter." So in the case of *The Queen vs. Wazir Mundul*, 25 W. R., 25, MACPHERSON and MORRIS, J.J., held: "Where there is a patent and unquestionable failure of justice it is necessary for the High Court to set aside the verdict of a Jury, but so long as trial by Jury exists, the verdict of a Jury must be accepted, and must stand, unless it is manifestly and certainly wrong."

Lastly, the Bombay High Court (WEST and NANABHAI HARIDAS, J.J.) in the case of *The Queen vs. Khanderao Bajirao*, I. L. R., 1 Bomb., 10, made the following observations in a case coming before it under section 263 of the Code of Criminal Procedure: "It is a well-recognised principle that the Courts in England will not set aside the verdict of a Jury, unless it be perverse and patently wrong, or



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may have been induced by an error of the Judge. We adhere generally to this principle, notwithstanding our large discretionary powers; first, on the constitutional ground of taking as little as possible out of the hands to which it has been primarily assigned by the Legislature; and, secondly, because any undue interference may tend to diminish the sense of responsibility. Burke, profoundly versed in the principle of the British Constitution, said of Juries: 'I will make no man, or set of men, a complement of the constitution.' In this country, we must never let our acquiescence grow into a betrayal of justice. When Juries know that they are liable to the scrutiny and supervision of this Court they will feel the necessity of exercising conscientious deliberation in arriving at their verdict. The same check will prevent temptation to a wilfully wrong verdict from being held out to them. It is our duty in the present case to satisfy ourselves that the verdict of acquittal is proper, or at least sustainable; and if we find that it is not, the law enjoins on us to set it aside and pass the right judgment ourselves."

The rule now laid down by the High Court is, that the mode of dealing with each case must depend upon its circumstances. In the case now reported Mr. Justice MARKBY was in favor of affirming the verdict of the Jury acquitting the prisoner, because he considered that they disbelieved the evidence against him, and there were grounds for coming to that conclusion. The majority of the High Court, GARTH, C.J., and PRINSEP, J., thought that the verdict was a perverse verdict, as there was no valid reason for disbelieving that evidence.

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## [CIVIL APPELLATE JURISDICTION.]

IN THE MATTER OF DESPUTTY SING, MINOR,  
 UNDER THE COURT OF WARDS, BY HIS NEXT } PETITIONER; 1877  
December 20.  
 FRIEND ABDUL HYE, MANAGER . . . . }

AND

DOOLAR ROY . . . . . OPPOSITE PARTY.

*Rules for the conduct of Business—Limitation—Presentation of Plaintiff.*

The rules of the Court, prescribing certain hours for the receipt of petitions and hearing of motions, cannot operate to alter the period of limitation prescribed by law, so as to exclude urgent applications made at any time in the day.

IN this case the Moonsiff refused to receive a plaint which was tendered by the petitioner, on the 8th of November last, on the ground that it was not presented during the hours set apart for hearing applications for the presentation of plaints. The plaint not having been received on that day, the suit became barred by limitation. Petitioner appealed.

The judgment of the Court<sup>1</sup> was delivered by

KENNEDY, J.:—

KENNEDY, J.

We are of opinion that the Moonsiff was wrong in this case.

The rules of the Court, prescribing certain hours for the receipt of petitions and hearing of motions, cannot operate to alter the period of limitation prescribed by law. Nor was it ever intended that those rules should exclude urgent applications made at any time during the day. Pleaders, however, must understand, when they interrupt the Court on the ground of their applications being extremely urgent, that it is their duty to satisfy themselves that such applications cannot be put off for a more convenient season another day.

The Moonsiff in the present case need have done nothing more

<sup>1</sup> AINSLIE and KENNEDY, J.J.

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**DOOLAR ROY.** than put the date on the plaint, to show that it was filed within  
*Judgment.* time ; and he might have deferred making any further inquiry or  
**KENNEDY, J.** order, until the usual hour of receiving such applications at the  
next sitting of the Court. He must receive this plaint as duly  
tendered on the 8th of November last, and allow the Government  
pleader to have the verifications proved as required by the new  
Civil Procedure Code.

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## [CIVIL APPELLATE JURISDICTION.]

SHEIKH MANIRULLAH . . . . . PLAINTIFF;  
 AND  
 SHEIKH RAMZAN ALI . . . . . DEFENDANT.

1877  
 December 5.

*Right of Occupancy—Estoppel by Conduct.*

If A allows B to deal with an occupancy tenure as full owner, and by an attempted transfer, to work a forfeiture thereof without any objection on his part, A will not be allowed to come in afterwards and claim a part of the forfeited holding on the ground that B was only part owner, and could, therefore, only work a forfeiture of his own share.

**A**PPEAL, under section 15 of the Letters Patent, from a decision passed by Mr. Justice LAWFORD.

This was a suit by a ryot for possession of a 12-annas share of an occupancy holding. It appeared that one Mahomed Shafi held the land in dispute as a ryot having a right of occupancy. After his death, his widow continued to hold and pay the rent of the tenure till 1873, when she sold it to one Khyrati Meah. The zemindar, thereupon, brought a suit for possession, which was granted on the 8th of August 1874. The present plaintiff, who is the son of the daughter of the step-brother of Mahomed Shafi, sues the zemindar, claiming that the widow had only a 4-annas share, and that the sale by her could only affect that 4-annas: and, therefore, that the decree obtained by the defendant in 1874 did not destroy plaintiff's right of occupancy in the 12-annas which he claims as the heir of Mahomed Shafi.

The Court of First Instance gave plaintiff a decree. On appeal, the lower Appellate Court reversed that decree on the grounds (1) that a right of occupancy, even if inheritable, was inheritable only by a person who succeeded to the entire holding, and could not be portioned out amongst several heirs under Act VIII (B.C.) of 1869; and (2) that the conduct of the plaintiff in standing by, and allowing the widow to deal with, the whole 12-annas as owner, and allowing the holding to be forfeited without making

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 —

any objection, estopped him from putting forward any claim in the present suit. Plaintiff then brought a Special Appeal.

LAWFORD, J., declined to express any opinion on the question whether a right of occupancy can be split up, but held that the Lower Court was perfectly right in dismissing the suit on the second of the grounds above-mentioned. Plaintiff again appealed.

Baboo Aukhil Chunder Sen, for Appellant.

Moonshee Serajul Islam, for Respondent.

The judgment of the Court<sup>1</sup> was delivered by

GARTH, C.J. GARTH, C.J. :—

We think there is no ground for this appeal. Since the last occupancy ryot died, the plaintiff, who claims to be his heir, took no steps to occupy the land himself; he never paid any rent to the landlord, nor attempted to obtain his share from the person who was occupying the land, namely, the widow of the last ryot.

He allowed her first to occupy the whole property for a time, and then to sell it to a third person, without objection; and now he comes and asks us, after three or four years, to have his rights recognised as a ryot having a right of occupancy.

The Court below has held he is not entitled to succeed under such circumstances; the learned Judge of this Court has come to the same conclusion, and we quite agree with him. The appeal is dismissed with costs.

<sup>1</sup> GARTH, C.J., and BIECH, J.

## [CIVIL APPELLATE JURISDICTION.]

OOMDA KHANUM . . . . . (JUDGMENT-DEBTOR);

1877  
December 20.

AND

MAHARANEE RAJ ROOP KOER . (DECREE-HOLDER).

*Mortgage Bond—Decree—Appointment of Manager—Act VIII of 1859,  
section 243.*

Act VIII of 1859, section 243, does not apply to a mortgage decree.

**REGULAR APPEAL** from an order passed by the Subordinate Judge of Gya.

In this case the usual decree on a mortgage bond was given against the judgment-debtor, in favor of the decree-holder. The judgment-debtor applied under Act VIII of 1859, section 243, to have a manager appointed of the property specified in the decree. The application was rejected and the judgment-debtor appealed.

Baboo *Aubinash Chunder Banerjea*, for Appellant.

Moonshee *Mahomed Yusuf*, for Respondent.

The judgment of the Court<sup>1</sup> was delivered by

AINSLIE, J.:—

AINSLIE, J.

Section 243, Act VIII of 1859, does not apply to a decree founded on a mortgage when that decree declares that certain property is to be sold in satisfaction of the mortgage debt.

The creditor's right of sale in such case rests on the mortgage decree and not on the attachment in execution. The decree cannot be varied by proceedings in execution thereof. The appeal must be dismissed with costs.

<sup>1</sup> AINSLIE and KENNEDY, J.J.

[ORIGINAL CIVIL JURISDICTION.]

1877 **RAM LOCHUN SIRCAR . . . . . PLAINTIFF;**  
*August* 18.  


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1878 **AND**  
*January* 18. **RAMNARAIN . . . . . DEFENDANT.**

*Constructive notice—Execution purchaser—Contribution.*

*Per KENNEDY, J.*—An execution purchaser takes subject to all equities affecting the judgment-debtor, and will be bound by constructive notice in the same way as an ordinary purchaser.

*Kinderly vs. Jervis*, 22 Beavan, 1; and *Brewer vs. Lord Oxford*, 6 De G., M. & G., 507, cited and followed.

If a decree declares a lien over A's property, for a certain sum, in favour of B, and subsequently A sells part of this property to B, and part to C, B cannot sue to enforce his lien against C's purchase without bringing his own into contribution.

**A**PPEAL from a decree passed by Mr. Justice **KENNEDY** in the Original Civil Jurisdiction of the High Court.

The essential facts of the case are as follows :—One Ram Chunder Halder died in 1836, possessed of a four annas share in the property in dispute, No. 70 Muddun Burrall's Lane, Calcutta, and other adjacent property. By his will he made Issur Chunder Mookerjee, Doorga Dass Mookerjee and Kistodhon Mookerjee his executors, and bequeathed to them eight annas of his property absolutely, and eight annas in a trust for such son as his widow—under a power given by the will—should adopt. In pursuance of the power the widow adopted one Nilmony Halder, who died childless in the year 1843, leaving his widow, Kamini Debi, him surviving.

Of the three executors, Issur Chunder alone proved the will. He took possession (it seems) of the property of the testator and wasted it. Previous to his death in 1843, Nilmony Haldar, the adopted son, frequently demanded, but without success, his eight annas share of the estate of Ram Chunder Haldar. Shortly after his death, his widow, Kamini Debi, instituted a suit against the three executors above-named for administration of the estate, for the eight annas share of that property which she claimed as heiress.

of her husband, Nilmony Haldar, and for an account. A receiver was appointed, and an injunction prohibiting any further dealing with the property was issued against the executors in 1855. Some time previous to this order, Issur Chunder Mookerjea had died, leaving his widow, Bindoo Bashini Debi, surviving, against whom the administration suit was revived.

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 —  
 Statement.

On the 13th of August 1858, Doorga Doss Mookerjea and Kistodhon Mookerjea, the two surviving executors of Ram Chunder Haldar, sold the four annas share of Ram Chunder in the property No. 70 Muddun Burrall's Lane, Calcutta, and in the adjacent property, to Kanai Lall Johurry, who proceeded to knock down the buildings thereon. Kamini Debi (who claimed two annas of Ram Chunder's four annas) instituted a suit against him, the surviving executors, and the widow of Issur Chunder Mookerjea to restrain Kanai Lall Johurry from pulling down the buildings, for compensation for the damage already done, and to have the rights of all parties declared. The injunction prayed for was granted; and as to the other relief this suit seems in some manner to have been consolidated with the administration suit. The date of this second decree was the 22nd of May 1860, and its effect is stated in the judgment of the Appellate Court, *infra*.

On the 28th of July 1862, a decree was passed in the administration suit, declaring, *inter alia*, Kamini's right to two annas of the property, No. 70 Muddun Burrall's Lane, and adjacent property; that over Rs. 43,000 was due to the estate of Ram Chunder Haldar from the estate of Issur Chunder Mookerjea: appointing a receiver in default of payment of the Rs. 43,000 within fourteen days; and reserving further directions, with liberty to apply.

Meanwhile a suit for partition was instituted by Kanai Lall Johurry against Kamini Debi, and Bindoo Bashini, the widow of Issur Chunder Mookerjea. The suit was decreed, and partition by metes and bounds effected by an ordinary conveyance under the Statute of Uses, dated the 11th of February 1865. Under this deed of partition thirteen annas and four pie of the property in Muddun Burrall's Lane *minus* two annas and eight pie of the damage done to the property, fell to the share of Kanai Lall Johurry; two annas of the property *plus* two annas of the estimated damage, to Kamini Debi; and eight pie of the property



1877-78 *plus* eight pie of the estimated damage, to Bindoo Bashini  
 RAM LOCHUN SIRCAR v. RAMNARAIN. Debi.

The final decree in the administration suit was made in 1873. It declared that Doorga Doss Mookerjee and Kistodhon Mookerjee were liable to pay into Court (and were ordered so to do) over Rs. 22,000, personally, and over Rs. 43,000 as heirs of Issur Chunder Mookerjee, to the credit of the estate of Ram Chunder Halidar; and it also declared Kamini's rights as heirs of the adopted son, Nilmony Halidar. The money was not paid into Court as directed.

In 1874, Ram Lochun Sircar, having purchased the full rights of Nilmony Halidar in the estate of Ram Chunder Halidar, from Kamini Debi and the reversioners, caused his name to be entered on the record of the administration suit instead of Kamini's. On the 16th of June 1875, he obtained a prohibitory order directing the defendants in the administration suit not to alienate any of the property which had formed part of the estate of Ram Chunder Halidar.

In 1876, Ram Lochun Sircar attached and sold and became himself the purchaser of some property belonging to Doorga Doss Mookerjee and Kistodhon Mookerjee, they not having paid into Court the money directed by the administration decree of 1873. The property, No. 70 Muddun Burrall's Lane, was also attached; but Ramnarain having intervened, Ram Lochun Sircar was referred to a regular suit. Upon this the present suit was brought. The defendants claimed as *bona fide* purchasers for value without notice of the plaintiff's title, which they did not admit. They did not set out their own title in their written statement.

*Evans*, for the Plaintiff.

*Bonnerjee* and *Allen*, for the Defendants.

KENNEDY, J. KENNEDY, J. :—

The facts which led up to this case prove, if proof were necessary, the propriety of the eloquent language of Mr. Justice PHEAR in *Grose vs. Amritomoye Dosses*, 4 B. L. R., O. J., 1, where he says: "This case unfortunately is of no exceptional character. It is but a type of what goes on daily. In every

Court of Civil Justice throughout Bengal, speculative traffic in law proceedings has assumed the dimensions and respectability of a regular trade. A large class in the community fattens and grows rich on the spoils of needy suitors. Litigation is promoted and maintained without reference to the wishes or interests of the nominal parties. As often as not, in cases where proprietary interests are in contest, the names on the record represent puppets which move at the bidding of persons who are in no way before the Court. The proceedings are carried on, not to adjust the rights of suitors seeking equity and justice, but in order that contingencies may be determined according to which the successful player in a great game of speculation will draw the stakes. I feel it impossible to exaggerate the magnitude of the evil. The *benami* system confined to the tenure of property is bad enough; but when it invades our Courts of Justice and takes away all sincerity and truth from the solemn administration of the law, it becomes destructive of the highest interests of society."

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The plaintiff claims, as assignee of one Kamini Debi, to be entitled to an undivided share in certain property in Muddun Burrall's Lane, or, at least, to a lien thereupon; and the history of the proceedings through which he seeks to make out his claim is an instructive illustration of the mode in which the "great game of speculation" may be played here. However that may be, if one of the gamblers has truly won the stakes, the Courts are bound to hand them over to him; but he certainly does not come before the Court in a way which entitles him to much sympathy or commiseration, if by any mistake in the rules of the game the golden prize escapes him.

The suit is for "possession of, or enforcement of a lien on, an undivided two annas share of No. 70 Muddun Burrall's Lane," and the following are the important allegations:—

"The said premises are bounded on the west by No. 71 Muddan Burrall's Lane, belonging to the plaintiff; on the south, partly by the premises No. 69 Muddan Burrall's Lane, belonging to the plaintiff. One Kally Churn Halder died in the year 1815, possessed of about 4 beegahs and eleven cottahs of land in Mullungah, of which the said premises are a part, and the

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premises 71 and 69 the residue. By his will he bequeathed the said land in the Mullungah Lane to Raj Chunder Haldar and Ram Chunder Haldar.

“ Ram Chunder Haldar made a gift of one moiety of his share to Mudoosoodun Haldar, and died in 1825 possessed of four annas of the said property, and of considerable real and personal estate. He left a will whereby he appointed Issur Chunder Mookerjea, Doorga Doss Mookerjea, and Kistodhon Mookerjea his executors, and bequeathed his estate to the said executors and to a son to be adopted by his widow, in two equal shares. The widow of the said Ram Chunder Haldar adopted Nilmony Haldar, who thereupon became entitled to two annas of the estate of Ram Chunder Haldar in the premises in dispute. Nilmony died without issue, leaving a widow, Sreemutty Kamini Debi. Issur Chunder Mookerjea alone proved the will, and wasted the estate, and died, leaving a widow Sreemutty Bindoo Bashini Debi, who (the plaint alleged) along with Doorga Doss and Kistodhon, the surviving executors, proceeded to further waste and mismanage the estate. In 1852, Kamini Debi filed her bill against Bindoo Bashini, Doorga Doss and Kistodhon, for the administration of the estate of Ram Chunder. The Supreme Court, under its order dated the 20th day of November 1856, referred it for taking an account of the estate of Ram Chunder Haldar possessed by Issur Chunder, by Bindoo Bashini as his widow, and by Doorga Doss and Kistodhon, and for an account of the profits received by Issur Chunder, by Sreemutty Bindoo Bashini, and by Doorga Doss and Kistodhon; and it was by this decree ordered that what, on the said account, should appear to have come to the hands of the said defendants Sreemutty Bindoo Bashini Debi, Doorga Doss Mookerjea, and Kistodhon Mookerjea, should be answered by them, respectively, personally; and what on the said account should appear to have come to the hands of Issur Chunder Mookerjea in his lifetime, should be answered by Bindoo Bashini out of his assets; and that if there was any balance due from the estate of the said Issur Chunder Mookerjea to the estate of the said testator, then he was to enquire whether Bindoo Bashini, as representative of Issur Chunder Mookerjea, had in her hands assets of the said Issur



Chunder Mookerjea sufficient to pay such balance; and it was further ordered that the defendants should deliver up possession of the estate of Ram Chunder Haldar to the said receiver thereby appointed; and that an injunction which had been issued on the 25th day of May 1855, restraining the defendants from further dealing with the said estate, should be continued.

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In 1858, the executors, disregarding the injunction, sold Ram Chunder's four annas of the Muddun Burrall's Lane lands to one Kanai Lall Johurry, who had, from other sources, acquired the remaining twelve annas. In the same year Kamini filed a bill against Kanai Lall Johurry in respect of the said four annas, the purport of which is not quite accurately set out in the plaint. The bill sets out the previous proceedings; it alleges that Kanai Lall had notice of them, and it prays:—

"1. That the rights and interests of the plaintiff and defendant, respectively, may be ascertained and declared;

"2. That the injunction of this Honorable Court may be issued to restrain the said Kanai Lall-Johurry from committing further waste of the said premises; and that an account be taken of the said waste committed;

"3. That a partition be made of the said premises according to the respective interests of the parties;

"4. That the plaintiff may have such further or other relief as the nature of the case may require."

At this period the present plaintiff appears upon the scene; and, in order to be sure of putting his case as high as it can be put, I think I can adopt no safer precaution than accepting his own statements, as made in his suit against Kamini filed in 1865. In his written statement there he says that "in September one thousand eight hundred and fifty-eight, Kamini was engaged in suits; and, being in want of funds to carry on the same, entered into an agreement bearing date the twenty-fifth day of September one thousand eight hundred and fifty-eight, whereby Kamini covenanted that she would, within two months after the successful termination of the said suits, pay to the plaintiff all sums he should advance her for her maintenance at the rate of thirty rupees a month, or otherwise, and all sums which he might properly disburse on her account, with interest at

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twelve per cent., and also the additional sum of eighteen thousand rupees by way of remuneration for his labour in the said affairs and business of the defendant. On the twenty-eighth day of October one thousand eight hundred and fifty-nine, the said defendant (Kamini) executed a Bengalli mortgage in favour of the plaintiff, whereby she, for nine thousand four hundred and sixteen rupees already advanced up to the date of the said mortgage, for any further sum or sums which might thereafter be advanced by the plaintiff, as also for the said sum of eighteen thousand rupees secured by the said instrument of the defendant, mortgaged to the plaintiff all the real and personal property, and decrees of several Adawluts, and the Talook No. 1076 in Purgannah Sahapore, &c., and Abad Ramlochunpore, &c., and agreed to pay the said several sums with interest, and to pay the half of the residue of her said property for the sum of eighteen thousand which she had agreed to pay as his remuneration." By a decree in the suit of *Kamini vs Kanai Lall*, dated the 22nd of May 1860, it was declared that the shares of Issur Chunder Mookerjea and of Doorga Doss Mookerjea and Kistodhon Mookerjea abovenamed, in the dwelling house and premises in the pleadings mentioned, purchased by the defendant as in the pleadings mentioned, known as the said Mullungah property, was liable in his hands to be applied in making good what, on the taking of the accounts directed in, and by the decretal order of, and in certain causes of this Court wherein Kamini was plaintiff and Sreemutty Bindoo Bashini, Doorga Doss and Kistodhon were defendants, might be found due from them (as respects the said Issur Chunder Mookerjea from his estate), or to which the plaintiff would be entitled as against the estate of the said Issur Chunder and Doorga Doss Mookerjea and Kistodhon, and that the share of Kamini should be delivered over to the receiver thereby directed to be appointed. Now, with respect to this decree, it was pressed very much in argument that it really created a lien. I suggested, and I still think, that it did not create a lien, that all it did was to declare one, and to determine, firstly, that as to Kanai Lall he had not acquired any interest in Kamini's own two annas; and, secondly, that in his hands the property could be made liable for the amount which might be found due from the executors in the

administration suit; in fact to declare that *pendente lite* no change of rights had occurred. I think that a plaintiff might at that time have brought before the Court, by supplemental bill, a purchaser *pendente lite*, instead of relying on the doctrine of *lis pendens*. This course was not taken in the suit against Kanai Lall; the suit was apparently original, and possibly objectionable on that ground. However, no such objection seems to have been taken, and the decree I have mentioned was made, which certainly did not give rights against Kanai Lall or those claiming under him greater than would have been created if he had been actually made a party to the administration suit by supplemental bill or otherwise. I do not think, however, that even if it could be properly said that the decree created the lien, it would, when we come to consider the subsequent events, make any substantial difference. In any case the decree did not profess to create any legal interest. It only professed to bind the lands in the hands of Kanai Lall; and though that would of course affect those claiming through him, it would, as I conceive, only affect them in the same way and to the same extent that it would have affected them if he had been a party.

The next material fact in the case is the report of the 31st May 1861, in the administration suit, in which the master found the amount due from Issur Chunder, and found the real estate belonging to Issur Chunder; but it contains an express finding that no evidence had been adduced to show that any estate of Ram Chunder had come to the hands of Doorga Doss or Kistodhon, and accordingly did not find that any had been received by them. This finding is not mentioned in the plaint, although it seems to me to have a very material bearing on the questions in the suit.

Next, we come to the decretal order based on that report, and dated the 28th of July 1862, by which it was declared: "That the plaintiff was entitled to a moiety of the estate of Ram Chunder Haldar after payment of such costs as the estate may be declared liable to pay and legacies; and that Doorga Doss Mookerjee, Kistodhon and Bindoo Bashini were entitled in equal shares to the other moiety thereof, subject to the payment of the said costs and legacies; and it was declared that there was due from the

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1877-78      estate of Issur Chunder to the estate of Ram Chunder the sum  
 RAM LOOHUN of Rs. 43,727 with interest; and it was ordered that Bindoo  
 SIRCAR      Bashini should, out of the assets of Issur Chunder, pay the said  
 v.      sum into Court, with interest thereon, within fourteen days, and  
 RAMNABAIN.      that in default the receiver appointed in the said suit should be  
 KENNEDY, J.      the receiver of the estate of the said Issur Chunder Mookerjee,  
                          and should realize the said amount out of the said estate. In the  
                          said decree other declarations were made, orders given, and ac-  
                          counts directed."

This last-mentioned decree is one of the utmost importance in the suit. It was (so far as I can discover), up to the year 1872, the last effectual proceeding taken, except a report made in 1863, which does not seem to be in any way material, as it has not been stated in the plaint, nor given in evidence; and I only discovered its existence from a recital in one of the later proceedings. It will be observed that on the face of that order there is nothing to make Doorga Doss or Kistodhon directly responsible, and in this the order is perfectly right; for it is based upon the report which, as I pointed out, in no way charges them. I do not say that the subsequent decrees fixing them with liability to the estate of Ram Chunder may not also have been perfectly right. There may have been, probably was, subsequent interference with the estate. They had subsequently become heirs of Issur Chunder, and liable in that capacity—a liability which, however, could not affect any antecedent purchaser from them—but anything of direct responsibility does not appear on the statement of the decree of 1862, given in the plaint, nor, so far as I can discover, in the decree at all; and this seems to me very material when the plaintiff seeks to charge the defendant as being in truth affected by a liability imposed on Doorga Doss and Kistodhon long after this decree, and after a long cessation of proceedings. The plaint then contains an excuse for the omission to put the receiver in possession of Issur Chunder's estate, an omission which probably led to considerable loss of rents and accumulation of interest on legacies, but which excuse seems to me wholly insufficient. Of course Kamini, through whom the plaintiff now claims, and the plaintiff, who was then her manager, are responsible for the omission if it were wrongful, and if it were one which the Court would visit

with any penalties; and it would be difficult to compare the order of 1862 with the final order, without seeing that great loss to the estate must have been caused by this delay. And if the laches of the plaintiff was the cause of this loss, surely it would be contrary to every principle of equity to enable him to indemnify himself from the property of third persons against loss so caused.

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At this point, I think it will conduce to a clear understanding of the questions between the parties to abandon the chronological order, so far as it would interfere with a connected history of the proceedings in the administration suit, and to conclude that in the first instance.

Bindoo Bashini died in the year 1866, and I am not informed of any further steps taken till I come to the decree of the 11th of January 1873, which refers to a report of the previous September, and which directed an enquiry as between Doorga Doss and Kistodhon, and which was followed by an account and by the final decree of the 1st of December 1873, by which it was declared "that there was due to the estate of Ram Chunder Halder Rs. 1,75,668-15-1; and that there was due from the said Doorga Doss and Kistodhon, both personally and as the heirs of Issur Chunder, to the estate of Ram Chunder, the sum of Rs. 81,160-13; that there was due from Doorga Doss and Kistodhon personally Rs. 5,433-13-6; that Kamini was entitled to three-sixths of certain funds in Court to the credit of these causes, and the said defendants Doorga Doss and Kistodhon as heirs of the said Issur Chunder Mookerjea to one-sixth thereof, and in their own right to the remaining two-sixths thereof; that after setting off in account the shares of Doorga Doss and Kistodhon, both in their own rights and as the heirs of Issur Chunder, there was due to the plaintiff from them, personally and as heirs, the sum of Rs. 22,617-5-11, and from them as the heirs of Issur Chunder the sum of Rs. 43,680-4-6. And it was ordered that Doorga Doss and Kistodhon should pay into Court to the credit of the causes, personally and as heirs of the said Issur Chunder Mookerjea, deceased, the said sum of Rs. 22,617-5-11 with interest thereon; and as the heirs of Issur Chunder Rs. 43,680-4-6."

The plaintiff became the purchaser of the interest of Kamini



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in the suit. I shall presently advert to the circumstances under which he obtained it. He also acquired the interest of the reversionary heir of Nilmony Haldar and procured the substitution of his name upon the record of the suit for that of Kamini. Doorga Doss having died, leaving Bama-soondery his widow and heiress, the plaintiff revived the suit against her and obtained a prohibitory order under the Procedure Code against her and Kistodhon, attaching, amongst other property, their right, title, and interest in a two annas share in the house No. 70 Muddun Burrall's Lane, which was sold to the plaintiff under that attachment. In addition to this property, the plaintiff also attached and purchased certain other property which had belonged to them or to Issur Chunder, and had formed part of the estate of Ram Chunder Haldar. One of the grounds of the plaintiff's claim rests upon this attachment and sale. Upon attempting to obtain possession under his purchase he was opposed by a person claiming on behalf of the defendants; and, on application to this Court under its summary powers, he was referred to a regular suit, the costs of the application to abide the result of the suit. With respect to this part of the case, I have no hesitation in saying that the plaintiff must fail. The prohibitory order and attachment were made in pursuance of a mode of procedure certainly erroneous. Doorga Doss and Kistodhon had ceased, for sixteen or seventeen years, to have any right, title or interest in the land; and if it could be made liable to the plaintiff's claim it must have been by some wholly different course. I think, therefore, that so far as the plaintiff claims relief in respect of his purchase at the execution sale, he must fail. The fact of the sale to Kanai Lall having been made pending the injunction in the administration suit, does not seem at all to vary the matter so far. The validity of the sale to Kanai Lall as against Doorga Doss and Kistodhon was fully recognised in Kamini's suit against Kanai Lall, whatever right she, or the plaintiff as her assignee, may have retained as against the property specially. I therefore think that I must dismiss the suit so far as the plaintiff relies on his title as an execution purchaser—the only one which would give him a right to the possession of the property; and as I understand that the order directing him to

bring a suit refers only to such a suit, I take it that the costs of the summary proceedings must be paid by him to the defendants. 1877-78  
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The other branch of this suit in which the plaintiff seeks to enforce the decree by way of lien seems to me to involve far greater difficulties. It will be remembered that Doorga Doss and Kistodhon had assigned to Kanai Lall their one anna and four pie share of the entire property in Muddun Burrall's Lane, and it is this which the plaintiff seeks to have made liable as being a two anna share of the house No. 70, which he alleges to be ten annas and eight pie share of the entire house. About this calculation there is some difficulty. I think the plaintiff is in error about it, and that his true relief, if any, would be against one anna and four pie of the whole to be taken out of No. 70; but for the present I pass this by, and come to the consideration of the facts upon which the plaintiff relies as entitling him to any relief against the defendants. As to this the plaintiff relies on the suit of *Kamini vs. Kanai Lall*, to which I have already referred; and then mentions a partition suit by Kanai Lall against Kamini and others. So far as I can discover, the bill has not been put in evidence; but in the plaint it is stated that by the decree therein, dated the 6th August 1862, the plaintiff Kanai Lall was declared liable to make good certain damage done by him to the property in Muddun Burrall's Lane, and was declared entitled to thirteen annas and eight pie of the property, subject to the claims of the defendants for compensation for the said damage, and also subject (as to one anna and four pie out of the said thirteen annas and eight pie as it stood previously to the damage) to the lien of Kamini under the decree in the suit of *Kamini vs. Kanai Lall*, which I have already mentioned. It declared the shares of the other parties, including Bindoo Bashini, and directed a commission of partition, account, and of compensation for damages. The Commissioners accordingly proceeded to make a partition; and, by their return dated the 22nd June 1863, they allotted to Kanai Lall the portion of the premises now known as No. 70 Muddun Burrall's Lane, after making allotments to Kamini and Bindoo Bashini, not only for their original shares but for compensation for the damage caused by Kanai Lall. It would seem that the partition was

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carried out by a conveyance operating under the Statute of Uses, and dated the 11th of February 1865, which was produced and proved. According to this the land now known as No. 70 Muddun Burrall's Lane, was conveyed to Kanai Lall subject (as to one anna and four pie) to the lien of Kamini under the decree of the 20th of May 1860. I have not any evidence of the defendant's devolution of title before me, but Mr. Bonnerjee informed the Court that he did claim title to the property under the partition through a conditional sale to Bissessur Persaud, through a judgment-creditor's sale of Bissessur's interest to one Bhugwan Doss, and through a conveyance from Bhugwan Doss to the defendants; but there is nothing to show how Kanai Lall's interest became vested in Bissessur's vendors. The dates of these instruments are as follows :—The partition deed, 11th of February 1865; the conditional sale, 22nd November 1867; the certificate of sale in execution, 20th February 1875; and the conveyance to the defendants, 23rd August 1875. Now, I take it that the view most favourable to the plaintiff is to assume that this was the devolution of the title, and that the vendors to Bissessur claimed lawfully under Kanai Lall; save that, by such omission, the plaintiff has wholly failed to establish any privity between the parties to the decree of 1860 and the defendants. There is nothing to show that Kanai Lall was in possession in 1865, and the Statute of Limitation would probably have barred the plaintiff's claims according to the principle of *Brojonath Choudhry's* case, 8 B. L. R., 104, and *Anundmoye Dossee's* case, 8 B. L. R., 122. Taking then this to be the devolution of title, we must consider how it is the plaintiff seeks to affect the defendants. If I am right in the view I have taken in respect of the decree of 1860, it created no fresh lien. It only declared one. It did not make Kanai Lall's position with respect to the executor's one anna and four pie worse nor better than it was before. The lien which Kamini had before, by virtue of the position of the executors and the institution of the suit, was no more changed than it would have been if Kanai Lall had been made a party by supplemental bill, or had himself been one of the executors and been originally a party to the suit. Now, in that case, we might have to consider whether there had been such an active and vigorous prosecution of

the suit as to bring the case within Lord Bacon's rule; and I think it very likely that it would be difficult to maintain, as a pure general proposition of law, that when there had been a dormitancy of nine years there had been such a prosecution. Kamini was a poor Hindoo widow; and it is possible that much allowance would be made for her laches; but the present plaintiff was her manager and was to be paid Rs. 18,000 for his services as such; and when he has, by such means as we shall see, succeeded to her rights, I do not think that he can make any case in his own favour by reason of her imbecility.

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But the facts go much beyond mere want of active prosecution, when we come to consider how it is that the plaintiff claims rights in this suit at all, and what was the position of Kanai Lall's vendors, namely, Doorga and Kisto. It will be remembered that, after the decree of 1862, no proceedings were taken for many years, save obtaining the report of 1863, about which no evidence has been laid before me; but I do not see how, on the terms of that decree, it was possible that Doorga Doss or Kistodhon could have been affected by the report; and then we find the plaintiff, on the 31st of May 1865, after the partition had been completed by conveyance, instituting a suit against Kamini, in which he alleges that, more than two years and six months before, the administration suit *had been brought to a successful termination*—an allegation which, in his written statement, he expounds as follows: "The said suit (*i.e.*, the administration suit) and others successfully terminated in the defendant's (Kamini's) favour, and the last decree she obtained in the High Court was in the month of July 1862." To this, Kamini made no opposition, and the plaintiff obtained a decree against her on the 21st September 1865 for Rs. 53,400. How this decree was obtained may be surmised by reference to the plaint and written statement in a subsequent suit of Kamini *vs.* Ram Lochun, which I shall have occasion presently to mention, and both of which documents are evidence against the plaintiff, as his present claim is, by virtue of the substitution of his name for Kamini's, on the record of the administration suit. He clearly claims under her, but I shall give him the benefit of considering his own written statement. The plaintiff's evidence here, and that written statement, do not

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enable me to find with any certainty up to what time he had advanced any money for costs in the administration suit; and though perhaps very great weight ought not to be attributed to his want of memory on account of his advanced age, still he seemed to me to retain a marvellously lively recollection of all facts which told in his favour, and duly to forget matters which might be dangerous to remember. He certainly advanced no money after his decree against Kamini; and it would have been inconsistent with his case in that suit to have made advances for costs after the decree of 1862.

Having obtained the decree of the 21st of September 1865, the plaintiff proceeded to execute it, and sold thereunder Kamini's interest in a talook (part of Ram Chunder Halder's estate) called Abad Ramlochunpore, for Rs. 10,000, which was paid by transfer, he himself being the purchaser. At this time Ram Lochun was, as before stated, possessed of a mortgage to secure the amount payable to him; and he thus became absolute owner of Kamini's interest in Abad Ramlochunpore for the Rs. 10,000. Not satisfied with this, Ram Lochun proceeded, in further execution of his decree, to seize and sell Kamini's interest in the administration decree; from this, however, he was restrained by the order of the Court.

"The plaintiff having taken other steps to enforce his decree against Kamini, she instituted a suit against him in *forma pauperis*, which was admitted in August 1869." In this she stated the preliminary history of the proceedings in respect of Ram Chunder's estate. She then proceeded to allege, with many additional charges, that the receiver, not having thought fit to take possession of talook Abad Ramlochunpore, "the defendant, availing himself of the refusal of the receiver to take possession of the said talook pending the appeal to the High Court, and disregarding the interests of your petitioner, applied for and in the name of your petitioner for execution of the said decree for possession, so made in favour of the said receiver and your petitioner as aforesaid, and, under the order made thereupon, the defendant, as such attorney as aforesaid, took possession of the said talook on the seventh of May, one thousand eight hundred and seventy-two. That the

defendant and his son, Sreenath Dass, a Pleader of the High Court and Pleader of the plaintiff in her mofussil suits, had obtained great influence over the plaintiff, who had implicit confidence in them; and, availing themselves of this advantage and of her ignorance of business, and of her totally helpless condition and her dependence upon them for her maintenance, they prevailed on your petitioner to sign certain papers purporting to be accounts of the sums advanced and expended by the defendant without giving your petitioner any opportunity or the means of having the same examined.

"The papers were formally read to your petitioner, but she had no means or power of ascertaining their correctness, and only signed them under the influence of the defendant and in consequence of her reliance upon them; and under such influence, and by the direction of the defendant, she desired her solicitor (whom the defendant on one occasion had accompanied to her house) to attest her signature to some of the said papers, and, before such attestation, represented to him that the said papers were correct."

She then states the institution of Ram Lochun's suit against her, and proceeds: "That your petitioner appeared to the suit through Mr. Gillanders, who had been her attorney. That soon after this, the defendant and his said son, Sreenath Dass, called on your petitioner, and by means of false representations and the exertion of the influence over her which they, as aforesaid, possessed, they induced her not to consult with her attorney, and they assured your petitioner that the said suit would not injure her, that they would make arrangements for her and their benefit by means of such suit; and, relying on such assurance, and being under their control, she did not file any written statement. That on the seventh day of July an application was made to this Honorable Court, on behalf of the defendant, that your petitioner should be ordered to file her written statement within twenty-four hours, and, in default, that the case should be transferred to the undefended Board; and thereupon, the said Mr. Gillanders appeared on the application and stated, as the fact was, that he had received his client's instructions to defend the said suit, and that the written statement was then ready at his office, but that your petitioner, as he was informed, having been kept under the control of the

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defendant, his assistants could not have access to her. On the 7th July, one thousand eight hundred and sixty-five, your petitioner's attorney, and Mr. Linton, (one of the interpreters) called at your petitioner's lodging-house, whereupon your petitioner, according to the desire of the defendant communicated to her shortly before, allowed them access to her; but, disregarding the advice then given to her by her said attorney, refused to sign the written statement which was then produced to her."

No doubt, in his written statement filed in 1869 in Kamini's suit, the defendant wholly denies these allegations as to the mode in which her assent was obtained to the judgment in that suit; but, in whatever way it was brought about, we have at least her admission and Ram Lochun's assertion that the administration suit had terminated—Ram Lochun, in the 21st paragraph of his written statement mentioning the report of Sir Mordaunt Wells as final, but giving no further information as to its contents. I need not further dwell upon the allegations of the plaintiff and written statement in that suit; they do give a lamentable picture of the consequence of the intervention of a suit broker; but the purpose for which they are here mentioned is to show that the administration suit was, so long ago as 1865, treated as being at an end, and also that if there were delay in its prosecution it was deliberate and intentional. Absolutely nothing seems to have been done to enforce the decree against Bindoo Bashini. If one were free to conjecture, one would suspect that Ram Lochun intended to prevent Kamini being able to obtain money to pay off her liability to him, in order to get the entire estate into his hands in the way he has done. He says in paragraph 22 of his written statement that Mr. Gillanders abstained from taking proceedings; but Ram Lochun had, under the original agreement, a copy of which is annexed to that statement, power to nominate attorneys. True it is that there is a provision in it that Mr. Gillanders is to continue attorney; but that of course would not have prevented his removal if he had declined to perform his duty. It is quite clear that, after his decree against Kamini, Ram Lochun never paid a pice further to carry on the proceedings; and, as I said before, it was impossible to discover with any certainty from his

examination that he had paid any after the decree of 1862. I should be strongly inclined to infer that the delay had taken place intentionally. In the present case, however, it is not very material if there were no excuse for it; and here no excuse is shown. It is manifest that the position of Kamini in her suit against Ram Lochun was one of great difficulty. She had admitted the accuracy of his accounts in the presence of her solicitor; she had, after warning from him and from the officer of the Court who took the accounts, deliberately submitted to judgment against her; and eventually (apparently after other proceedings which have not been put in evidence) she, on the 11th June 1874, entered into a compromise by which practically she transferred to Ram Lochun her rights in the suit for a small sum—apparently, about Rs. 2,400; this was accomplished by a consent order of the above date.

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Now, in this case, what the plaintiff seeks to enforce is a purely equitable charge, which certainly would not be available against a purchaser for valuable consideration without notice or that which is equivalent to notice. Now, first, as to actual notice it is not pretended that it exists; but Mr. Evans points out that the only mode in which title could be made to this piece of land in severalty would be through the partition deed which, on the face of it, gives notice of the liability; and, therefore, according to a well-known principle, the purchaser must be taken to have seen and known it; because, in the usual course of events, a purchaser ought to examine the title deeds, and he cannot make his title better by his own neglect or remissness. Mr. Bonnerjee contended that, as an execution sale intervened, the execution purchaser had not the opportunity of acquiring notice and stood in a better position than an ordinary purchaser; but to this proposition I could not accede, as it is clearly in conflict with *Kinderly vs. Jervis*, 22 Beavan, 1, and *Beavan vs. Earl of Oxford*, 6 D. G., M. & G., 507, which, I think clearly enough decide that the execution purchaser takes subject to all equities affecting the judgment-debtor. In this case the judgment-debtor was one Bissessur Pershad who had purchased in 1867, and who, therefore, would be presumed by a Court of Equity to have seen and known of the partition deed of 1865, and thus of the decree of 1860.



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But would the presumption stop there? Would it not also be presumed that, knowing of that decree, enquiry would have been made respecting the administration suit? And if such enquiry had been made, it would have appeared that there was a decree by which it was declared that there was no evidence of liability against Doorga Doss or Kistodhon, no effective proceedings taken upon this, and, if further search had been made, a decree of this Court would have been found establishing (as between Ram Lochun and Kamini, at least) that the administration suit had come to a successful termination, and that the decree of 1862 had been seized by Ram Lochun in execution of the decree which determined that proposition. We have thus, on the part of the plaintiff, not merely want of diligent prosecution of the suit within the language of the authorities relating to *lis pendens*, but conduct calculated to mislead, and which presumably would have misled subsequent purchasers through whom the defendant claims; and here, I think, the peculiar position of the defendant, as claiming through an auction-purchaser, may give him some aid. All presumptions must be made against him which would be made against one who took after a regular investigation of title; but I think that similar intendments may properly be made in his favour, and especially that it would be unreasonable to require him, claiming hostilely to the judgment-debtor, to give evidence that the investigation had been actually made by which the state of the proceedings in the administration suit would have become known. Possession had gone for years according to the defendant's title; and he purchased the estate from one who, if he had used the highest reasonable diligence, must have been misled by the plaintiff's conduct. I think, therefore, that the conduct of the plaintiff and Kamini in the administration suit has been, such as would, to put it at the very lowest, have a tendency to mislead persons purchasing under Kanai Lal; and that, therefore, according to a well-known principle illustrated in *Rice vs. Rice*, 2 Drewry, 73, the plaintiff would not have a right to enforce the alleged lien against them. Further, we have no information respecting the mode in which Doorga Doss and Kistodhon became chargeable with the large sums found due from them. For, as the report on which the decree of 1862

was based shows that, up to that time, there was no evidence of misapplication by them; and that, as there was a finding substantially in their favour, the only inference is that the sums ultimately found due from them were sums which came to their hands in consequence of the neglect of the plaintiff and Kamini to take the estate of Ram Lochun out of their hands; in which case the plaintiff could certainly not throw the consequence of his own laches upon the previous purchaser. On these grounds, which go directly to the merits and are based on equitable principle, I think the plaintiff must fail; but there are other and technical grounds which I think make this suit untenable.

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In the first place, there is no order in the administration suit to pay to the plaintiff; there is merely an order to bring into Court. The present suit is not supplemental to the administration suit nor to Kamini's; and I feel great difficulty in seeing how a mere party to a suit in which money is directed to be brought into Court can institute such a proceeding as this. This objection perhaps takes a force beyond that of mere technicality, when we consider the principle upon which Kamini obtained a lien over the shares of Doorga Doss and Kistodhon. The injunction in her suit was not based upon any thing like the statutory attachment before judgment; it was evidently granted because the estate of Ram Ohunder was in course of administration in the suit. There was alleged waste of that estate; the executors might have been able absolutely to pass a good title to a vendor, and the persons beneficially entitled had a right to have the whole estate administered in that suit, so as to make the beneficial interests of the executors recoup the amount of any assets wasted by them. This suit, however, is essentially different; it does not seek to have the entire assets so administered, but tries to throw the whole *balance* of the amount upon a particular denomination, the residue of the property having been dealt with in a different manner. I do not think that this suit is one which, in its present form, could succeed even if there were not the objections on the merits, which I have mentioned. In the next place, it does not appear that measures have been taken to compel Doorga Doss and Kistodhon to obey the decree; and it is certainly clear that the purchaser from them would be entitled to be indemnified

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by any other property subject to the same liabilities, which Doorga Doss and Kistodhon had subsequently sold—*Amruth vs. Wade*, Lloyd and Goold. Rep. temp. Sugden, 252. Again, it appears that the plaintiff himself had purchased, under execution sales against them, the right, title and interest of the defendants in Kamini's suit in lands affected by the lien. I think that, without bringing these properties into contribution, he certainly would not be entitled to enforce this lien.

There seems to me to be some misapprehension as to the shares allotted in the partition suit. The plaintiff seems to have assumed that the meaning of the decree and allotment was to give a portion of the land equal to the original share as equivalent to the damages in respect of such share, but that is not the true construction. The decree directs to be given to Kamini and Bindoo Bashini a share of the damage bearing the same proportion to the whole damage, whatever that might be, which the share of the land to be allotted to each bore to the whole land; and therefore expressed this share by the terms of a similar fraction. But the amount awarded as damages is left wholly undetermined by the return. The plaintiff would, therefore, not be entitled to the relief in the precise form in which he seeks it; but this is at present not so material, as on the grounds of the conduct of plaintiff and Kamini, as I have above stated it, and of the report and decree of 1862 absolving Doorga Doss and Kistodhon, I must dismiss this suit with costs.

I feel that my judgment is of unusual length; but, as I had not the advantage of hearing any reply on behalf of the plaintiff, and was therefore unable to obtain the assistance of Counsel in pointing out how the difficulties which I felt might, if at all, be removed, I thought it necessary to go into the principal questions in great detail.

The plaintiff appealed; when the following judgment was delivered by the Court:—

GARTH, C.J. GARTH, C.J. :—

As we intimated yesterday at the close of the argument for the appellant, we think that, without entering into the many questions

<sup>1</sup> GARTH, C.J., and MARKBY, J.

which have been raised in the suit, there is one short ground upon which this appeal ought to be dismissed.

The plaintiff, (the appellant), seeks to establish a lien or charge upon the property in question in the hands of the defendant, who has purchased that property, and who, we will assume for the present purpose, had notice of such lien or charge at the time of his purchase.

The appellant does not rest his claim upon any general doctrine of *lis pendens*, as applied to administration suits, but simply upon the lien or charge which was created in favor of his predecessors by the decree of the 22nd of May 1860.

By that decree it was declared that the shares of Issur Chunder Mookerjee, deceased, of Doorga Doss Mookerjee and of Kistodhon Mookerjee, in the dwelling-house and premises mentioned in the suit were liable in the defendant's hands to be applied in making good to Kamini, under whom the present plaintiff claims, what, on the taking of the accounts directed in and by the decretal order bearing date the 20th November 1856, might be found due from them; or, as respects the said Issur Chunder Mookerjee, from his estate.

Subsequently to that decree being made, the master, on the 31st of May 1861, made his report as directed, whereby he found that there was a considerable sum of money due from the estate of Issur Chunder, but that no evidence had been adduced to show that any real or personal estate of Ram Chunder Haldar, or any rents and profits of his real estate, had been received by Doorga Doss and Kistodhon. Under that finding, therefore, and the decree which was subsequently made upon it, no charge was established against the property of Doorga Doss and Kistodhon. The only charge was against the estate of Issur Chunder.

But the appellant here does not seek to enforce a charge against the estate of Issur Chunder, because he is himself the holder of that estate. The charge which he seeks to establish is against the estate of Doorga Doss and Kistodhon, and as, on the taking of the accounts, nothing was found due from their estate, it is clear that the plaintiff failed to establish the particular lien or charge upon which alone he relies. The appeal is dismissed with costs.

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## [PRIVY COUNCIL.]

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BRIJ INDAR BAHADUR SINGH . . . }  
LAL SHUNKER BUKSH . . . } PLAINTIFFS;  
LAL SEETLA BUX . . . }

AND

RANEE JANKI KOER . . . . . DEFENDANT.

*Mitakshara—Dayabhaga—Separate property of Women, distribution of—  
Act I of 1869 (Oudh Estates' Act).*

The Mitakshara and Dayabhaga on the separate property of women and its distribution discussed.

The positive limitations regarding succession, which are contained in section 22, Act I of 1869, are in no way controlled by the provision in 3rd Section of the Act, namely, that the right acquired by virtue of a Taluqdari Sunnud should be subject to all the conditions affecting the Taluqdar contained in the Sunnud under which the estate is held.

*Mussamut Thakoor Deyhee vs. Rai Baluk Ram*, 11 Moore's Ind. App., 189; 10 W. R., 3 P. C., quoted as containing the rule for devolution of property inherited by a woman from her husband.

Act I of 1869 (the Oudh Estates' Act) discussed and explained.

**A**PPEALS from decrees passed by the Commissioner of Pertabghur and the Judicial Commissioner of Oudh.

The facts of the case are sufficiently set forth in the judgment of their Lordships,<sup>1</sup> which is as follows :

These three appeals were argued together. In each of them the appellant was plaintiff in a separate suit instituted by him against the respondent in the Court of the Deputy Commissioner of Pertabghur, to recover possession of Taluka Pawansi, in Pergunnah Dingwas, in the province of Oudh. In each case the plaintiff claimed to have become entitled to the taluka, by right of inheritance, upon the death of Thakurain Kablas Koer, the mother of the defendant.

<sup>1</sup> Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, and Sir MONTAGUE E. SMITH.

The property in dispute was formerly part of the estate of Rai Chein Singh, the great-grandfather of Mypal Singh. Mypal Singh held it under the Native Government down to the time of his death, in 1260 Fuallee, corresponding with the year 1852-53.

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Upon his death he left two widows; the first-married was Mussamut Subhao Koer, and the second the above-mentioned Thakurain Kablas Koer. By his first wife, Subhao Koer, he had two daughters, of whom the elder, Jaganath Koer, was the mother of the appellant, Brij Indar Bahadur Singh. The other died without issue. By his second wife, Thakurain Kablas Koer, he had one daughter, Ranee Janki Koer, who married Rai Bajai Bahadur Singh, and is the defendant in the suits, and the respondent in each of the three appeals.

At the time of the annexation of Oudh the estate was in the possession of the aforesaid Kablas Koer, to whom it had descended as the surviving widow of her deceased husband, Mypal Singh. In 1858 the estate was confiscated by the British Government by virtue of Lord Canning's proclamation of the 15th March in that year. The summary settlement for 1858-59 was made with Kablas Koer. In the kabulyat, dated 20th April 1858, executed on her behalf on that occasion, she was described as the widow of Lall Mypal Singh, and it appears from an administration paper put in evidence in Brij Indar's case (Record, page 8), that Kablas Koer admitted that in virtue of the ancestral right of her husband the regular settlement had been made with her.

A Sunnud was afterwards granted to her by Government, by which the full proprietary right, title, and possession of the estate was conferred upon her and her heirs for ever, subject to certain conditions which are not material with reference to the present case. It was also declared to be another condition of the grant that in the event of her dying intestate, or of any of her successors dying intestate, the estate should descend to the nearest male heir, according to the rule of primogeniture, but that she and all her successors should have full power to alienate the estate, either in whole or in part, by sale, mortgage, gift, bequest, or adoption, to whomsoever she should please. It was also further declared that, as long as the obligations imposed by the

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grant should be observed by her and her heirs in good faith, so long would the British Government maintain her and her heirs as proprietor of the estate.

It is extraordinary that this Sunnud is without date, at least it so appears in the copy put in evidence in each of the three suits; but it must have been subsequent to the date of the letter from Major MacAndrew, the Deputy Commissioner, of the 4th February 1861 (Record, Seetla Bux's Case, page 4), for he there states that if Kablas would file a deed of will in the terms of the proposal therein contained, she would receive a Sunnud for the estate from Government. It must also have been after the date of her petition in answer, dated 15th March 1861, in which she asks to have a Sunnud for life granted to her. It is exceedingly inconvenient, but it often happens in records sent up from the Courts in Oudh, that documents are without dates. Their Lordships mention this, that the attention of the Judicial Commissioner may be drawn to the subject.

The letter from Colonel MacAndrew, to which reference has just been made, and the petition of Kablas in answer to it, were relied upon in the argument on the part of the appellants, in order to show that under the grant to her and her heirs the heirs of her husband must have been intended. They appear, however, to their Lordships strongly to support the view that the grant to Kablas and her heirs was not made through inadvertence, and that her heirs were intended. In the letter Colonel MacAndrew says: "Among the Thakoors of Dingwas there is no one next of kin to the husband of the Thakurain who may be declared as heir, and according to the Circular Orders she has power, after the receipt of the Sunnud, to alienate her estate by will to any one." He gives reasons why she should make a will in favour of Seetla, and concludes by saying, "if you file a deed of will in terms of the above proposal, you will receive a Sunnud for the estate from the Government." (Record, p. 4). In her petition in answer, after pointing out her objection to execute a will in favour of Seetla Bux, she concludes, "I myself am at a look-out, and as soon as I get a person of high family, good character, and condescending manners, such as will answer my choice, I will let your Honour know. Meanwhile, it will be an act of grace on your part to

confer a Sunnud on me for life. On no account am I willing to adopt Seetla Bux and Shunker Bux. I therefore pray that, on receipt of the Report from Pertabghur District, my objections herein laid down may be fully taken into consideration."

The Government after this, and after having had time for considering the expediency of granting to Seetla Bux the succession to the estate upon the death of Kablas, conferred the estate upon her and her heirs male, according to the law of primogeniture, without even mentioning the status of Kablas as a widow, either in the operative words or in describing her. If, therefore, the letter and petition could properly be taken into consideration in construing the Sunnud, with a view to ascertain the intentions of Government, they would operate more against than in favour of the claims of Seetla and Shunker.

Upon the death of Kablas, in August 1872, the appellant, Brij Indar, claimed to inherit as the son of Jaganath Koer, the daughter of Subhao, the first wife of Mypal, and the rival wife of Kablas. Lal Shunker Bux and Lal Seetla Bux each claimed as a distant collateral relative of Mypal, the deceased husband of Kablas. Each was a son of Ragnath Singh, who was a great-grandson in the male line of Rai Chein Singh, who was the great-grandfather of Mypal Singh. Seetla was the son of the first wife of Ragnath, and Shunker, who was born before Seetla, was the son of the second wife. Each claimed to be male heir according to the law of primogeniture.

The Deputy Commissioner dismissed the suit of Brij Indar, and also that of Shunker Bux, and his decrees in those suits were affirmed by the Commissioner. There was, therefore, no appeal to the Judicial Commissioner in either of those cases, and in each of them the appeal to Her Majesty in Council is from the Judgment of the Commissioner. In the case of Seetla Bux the Deputy Commissioner decreed for the plaintiff. The Commissioner, upon appeal, reversed that decree, and decreed the taluka to the defendant, Janki Koer, and upon appeal to the Judicial Commissioner he affirmed the decree of the Commissioner. The appeal of Seetla Bux to Her Majesty in Council is, therefore, from the Decree of the Judicial Commissioner.

The case is an important one, and was very ably argued on

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behalf of each of the parties, and their Lordships have very carefully considered all the arguments which were urged, and the authorities which were cited in support of the claims of the several appellants. The first question to be considered is whether the estate, in the event of the intestacy of Kablas, descended to her heirs or to the heirs of her husband. Upon this point their Lordships entertain no doubt. They consider that the Sunnud conferred, and was intended to confer, a full proprietary and transferable right in the estate upon Kablas and her male heirs according to the law of primogeniture, and not merely to confer upon her an estate for life, with full power of alienation, and with remainder to the male heirs of her husband, in the event of her dying intestate without having alienated it in her lifetime.

If the interest which Kablas, as the widow of her deceased husband, originally took in the property had remained unaltered, she would have had no power of alienation either in her lifetime or by will. The estate would have descended to the heirs of her husband, and not to her heirs; but her interest as widow and that of the reversionary heirs were absolutely destroyed and put an end to by the confiscation under Lord Canning's Proclamation, by which it was declared that "the whole proprietary right in the soil is confiscated to the British Government, which will dispose of that right in such manner as to it may seem fitting." In disposing of that right by the Sunnud, the Government granted to Kablas and her heirs male, according to the law of primogeniture, the full proprietary right and title to the estate.

The title, however, does not depend entirely upon the Sunnud; for in 1869, Act No. I of that year was passed to prevent, as appears from the preamble, doubts as to the nature of the rights of certain talukdars and others in the estates which had been conferred upon them by the British Government, and as to the course of succession thereto.

By section 2 the word "Talukdar" was defined, and it was declared to mean "any person whose name is entered in the first of the lists mentioned in section 8. The name of Thakurain Kablas Koer was entered in the first of such lists. It was also entered in the second of the lists mentioned in section 8 as one,

whose estate, according to the custom of the family on and before the 13th February 1856, ordinarily descended to a single heir.

By section 10 of the Act, list No. 1 is conclusive evidence that Kablas was a talukdar within the meaning of the Act, and there can be no doubt that the estate in dispute is one of the estates referred to by the Act, and that by virtue of section 3, Kablas Koer must be deemed to have acquired by the Sunnud a permanent heritable and transferable right in the estate in dispute. It was contended by Counsel that a trust was created, and that Kablas took the estate upon trust for those who would have been entitled to it if it had not been confiscated. To hold that such a trust arose would reduce to a nullity the confiscation and the disposal by the Government of the property confiscated. The power of alienation by sale, mortgage, gift, or bequest, was wholly inconsistent with an intention on the part of Government to create a trust for the benefit of the reversionary heirs of her husband. Their Lordships are of opinion that no trust was created by the Sunnud or by the Act of 1869; and there is no evidence that a trust was created in any other manner.

As regards the succession, their Lordships are of opinion that the limitation in the Sunnud was wholly superseded by Act I of 1869, and that the rights of the parties claiming by descent must be governed by the provisions of section 22 of that Act. By that section it was enacted, that if any talukdar whose name should be inserted in the second, third, or fifth of the lists mentioned in section 8, or his heir or legatee, should die intestate, such estate should descend in manner therein described. Their Lordships do not consider that the positive limitations in that section are in any way controlled by the provision in the 3rd section of the Act, that the right acquired by virtue of the Taluqdari Sunnud should be subject to all the conditions affecting the Talukdar contained in the Sunnud under which the estate is held. They understand the conditions referred to in clause 4 of that section to be the conditions of loyalty and good service mentioned in the letter of the 19th October 1859, republished in the first schedule of the Act, and to the other conditions of a similar nature, such as those

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of surrendering arms, destroying forts, &c., contained in the Sunnud.

It was contended in the Lower Court, on the part of Brij Indar, that he, being the son of a daughter of a rival wife, and having been treated by Kablas in all respects as her own son, came within the meaning of clause 4 of section 22; but it was found by both the Lower Courts that there was no proof that he had been so treated, and their Lordships entirely agree in that finding. It is unnecessary, therefore, to express any opinion as to whether he was the son of a daughter of Kablas Koer, the talukdar, within the meaning of the clause.

It having been decided that Brij Indar did not come under clause 4 of section 22, neither of the plaintiffs is within the description contained in clauses 1 to 10, both inclusive.

The case is, therefore, to be governed by clause 11, which is as follows: "Or in default of any such descendant, then to such persons as would have been entitled to succeed to the same under the ordinary law to which persons of the religion and tribe of such talukdar or grantee are subject."

In the absence of any special custom applicable to the particular tribe or family to which Kablas belonged (as to which advertence will be made hereafter), the ordinary law applicable to persons of her religion and tribe is the Mitakshara. Chapter 2, section 11, treats of the separate property of a woman, and of the distribution of it. In par. 1 of that section it is said: "What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other (separate acquisition), is denominated a woman's property."

It was stated, in the course of the argument by the learned Counsel for Shunker Bux, that in the original of par. 1, cap. 2, section 11 of the Mitakshara, and of par. 12, cap. 4, section 1 of the Dayabagha, the words translated as "separate acquisition" are not used, and that the proper translation is "and the like," or "and such like." It does not appear to their Lordships to be important whether this is so or not. The learned Counsel may be correct. But the words "and the like" or "and such like"

would show that the author did not intend to limit his definition to the particular kinds of property therein enumerated. This is very clear when the subsequent paragraphs are referred to.

At par. 4, cap. 2, section 11 of the Mitakshara, it is said: "The enumeration of six sorts of woman's property by Menu, 'What was given before the nuptial fire, what was presented in the bridal procession, what has been bestowed in token of affection or respect, and what has been received by her from her brother, her mother, or her father, are denominated the six-fold property of a woman' (Menu, 9, 194), is intended, not as a restriction of a greater number, but as a denial of a less."

The Dayabagha is to the same effect. Par. 18, cap. 4, sec. 1, is as follows: "Since various sorts of separate property of a woman have been thus propounded without any restriction of number, the number six as specified by Menu and others is not definitely meant. But the texts of the sages merely intend an explanation of woman's separate property. *That alone is her peculiar property, which she has power to give, sell, or use, independently of her husband's control.*"

Again, in the Mitakshara, par. 2, section 11, it is laid down that property which she may have acquired by inheritance, purchase, partition, seizure, or finding, are denominated by Menu and the rest "woman's property." Again, par. 3:—"The term 'woman's property' conforms in its import with its etymology, and is not technical; for if the literal sense be admissible, a technical acceptance is improper." There is a note to par. 2, above quoted, with reference to property obtained by inheritance, and their Lordships' attention was called to it by the learned Counsel for Shunker Bux; but as the estate in dispute did not come to Kablas by inheritance, it is unnecessary to determine whether immoveable property acquired by a woman by inheritance is "woman's property." It has been decided that a woman cannot, even according to the Mitakshara, alienate immoveable property inherited from her husband, and that upon her death it descends to the heirs of her husband, and not to her heirs—*Mussumat Thakoor Deyhee vs. Rai Baluk Ram*, 11 Moore's Indian Appeals, at p. 175; 10 W. R., 3 P. C.

The question does not arise in this case whether if the grant

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had been made to Kablas in her husband's lifetime, the property would have been her peculiar property over which her husband would have had no dominion or control (see Dayabagha, cap. 4, section 1, pars. 20 and 23); for the property was granted to Kablas after her husband's death. The taluka must, in their Lordships' opinion, be considered to have been the property of Kablas at the time of her death. A woman's property having been described in the first eight paragraphs of the section, the distribution of it is then propounded—"her kinsmen take it if she die without issue;" but it is only in the event of her dying without issue that her kinsmen succeed. Par. 9 goes on: "If a woman die 'without issue'—that is leaving no progeny—in other words, having no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property, as above described, shall be taken by her kinsmen, namely, her husband and the rest, as will be forthwith described." Par. 10.—"The kinsmen have been declared generally to be competent to succeed to a woman's property." The author now distinguishes different heirs, according to the diversity of the marriage ceremonies. The property of a *childless* woman married in the form denominated Brahma, or in any of the four unblamed modes of marriage, goes to her husband; but, if she leave progeny, it will go to her daughter's daughter. In other forms of marriage, as the Asura, &c., it goes to her father and mother on failure of her own issue." The words "daughter's daughter" are made clear by par. 15: "On failure of all daughters, the grand-daughters in the female line take the succession, under the text; 'if she leave progeny it goes to her daughter's daughter. And, again by par. 12, "In all forms of marriage, if the woman leaves progeny, that is, if she have issue, her property devolves on her daughters. In this place, by daughters, grand-daughters are signified; for the immediate female descendants are expressly mentioned in a preceding passage: 'The daughters share the residue of their mother's property after payment of her debts.'" Par. 13. "Hence, if the mother be dead, daughters take her property in the first instance." Par. 16 deals with the case of a multitude of grand-daughters, and is not applicable to the present case.

A custom of the tribe was set up and relied upon to the effect

that the property of a Bissein could be inherited only by a Bissein, and that it descended to collateral male heirs in preference to a daughter. The Commissioner in his judgment said that the custom among Chattris that collaterals are preferred to daughters is no doubt true, but it cannot be said to be specially proved in the case of Bissein Chattris. The Judicial Commissioner, however, was of opinion that the plaintiff had failed to prove the special usage and custom which he had set up, and that there was no sufficient evidence to warrant the Courts excluding daughters from the succession (Record, in Seetla Bux's Case, 100). Their Lordships concur in that view, and are of opinion that there was no sufficient evidence to prove the custom set up. Beyond all doubt there was no such custom proved as regards the separate or absolute property of a woman. Their Lordships are, therefore, of opinion that, under clause 11, section 22, the estate descended to the defendant (respondent) as the person entitled under the ordinary law to which person of her mother's religion and tribe were subject; and being of that opinion, it is not necessary to consider whether, if Kablas had died without issue, either of the plaintiffs would have been entitled to succeed to the estate.

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The Judicial Commissioner held that the persons entitled to succeed must be sought amongst the heirs of the husband, and not of the widow. (Record, p. 100.) In this view of the case their Lordships, for the reasons above stated, cannot concur. The decree of the Judicial Commissioner was notwithstanding correct; for he, holding that the defendant was heir to her father, Mypal, dismissed the appeal against the decree in her favour.

Their Lordships hold that that appeal was properly dismissed upon the ground that the talook descended to her as heir to her mother, who, at the time of her death, was the talukdar, and had a permanent heritable right in the estate.

Their Lordships will, therefore, humbly recommend Her Majesty to affirm the decrees of the Commissioner in the respective cases of Brij Indar and of Shunker Bux, and to affirm the decree of the Judicial Commissioner in the case of Seetla Bux.

The appellants in each of the appeals must pay the respondent's costs in that appeal.

## [CIVIL APPELLATE JURISDICTION.]

1877  
November 28.

KARTICKNATH PANDAY . . . ONE OF THE PLAINTIFFS;

AND

KHAKUN SINGH . . . . . DEFENDANT.

*Evidence—Admissibility—Doul Fehrist—Registration Act, VIII of 1871, section 17.*

A *doul fehrist* containing a list of the holdings and rates of rent of the ryots with their signatures, and specifying that these holdings were to continue for seven years, does not constitute a contract to cultivate for that period, and is admissible in evidence without being registered.

**S**PECIAL APPEAL from a decree of the Officiating Second Subordinate Judge of Bhaugulpore, reversing a decree of the Moonsiff of Monghyr.

The judgment appealed from was as follows :—

“ This was a suit for arrears of rent at a certain rate, admittedly in excess of the rent previously paid by defendant. This old rate was said to be Rs. 2 per beegah, and this new rate is Rs. 3-1-6. The plaint was accompanied by *jumma-wasil-bakees* relating only to the years in dispute, for which, of course, no rent had been paid. At a later stage of the suit, there was filed a document which it pleased the plaintiff to call a *doul fehrist*. It contained a list of the holdings and rates of rent of the ryots with their signatures, and was in fact the real basis of the suit on which the *jumma-wasil-bakees* had been prepared. This document, whatever it might be called by plaintiff, was nothing more or less than the record of the new rates of rent, and the signatures of the ryots were taken to it in testimony of their agreement to cultivate the lands at the rate mentioned. It specified seven years as the period for which these holdings were to continue, and should, therefore, have been registered. Not being registered, it could not be received in evidence, nor could secondary evidence of what it records be received ; it is the basis of plaintiff's claim, and being rejected carries the claim with it. It must be dis-

tinguished from an ordinary *doul* or ryot's petition to the zemindar to be granted certain lands. That, I know, does not require registration; but this document, if it is anything, is an agreement to cultivate, and must be registered. This objection is the first of those taken in appeal; and, as I hold it fatal, I do not go into the others. I decree the appeal, reversing the lower Court's decree, with costs at 6 per cent. per annum till realization."

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Baboo *Unnoda Persad Bannerjea* and Baboo *Nil Madhub Sen*,  
for Appellants.

Baboo *Kali Kissen Sen*, for Respondent.

The judgment of the Court<sup>1</sup> was delivered by

JACKSON, J.:—

JACKSON, J.

The question that arises in this special appeal is whether the lower Appellate Court is right in reversing the decree of the Court below, and apparently dismissing the suit on the ground of the reception of a document called *doul fehrist* which, in the opinion of the lower Appellate Court, was inadmissible because it was not registered and not stamped. It is not discoverable from the judgment of the Moonsiff that any objection had been taken to the *doul* in the Court of First Instance on that ground. The contest before him appears to have been whether the *doul* was genuine or not, that is to say, whether it recorded facts which were actually true. But the Judge holds that it was "nothing more or less than the record of the new rates of rent, and that the signatures of the ryots were taken to it in testimony of their agreement to cultivate the lands at the rate mentioned. It specified seven years as the period for which these holdings were to continue, and should therefore have been registered." Now, it seems that the plaintiff, when he filed his plaint, filed not only the jumma-wasil-bakees relating to the years in dispute, but at a latter stage of the case a document was also filed which, as Mr. Hallett says, "it pleased the plaintiff to call a *doul fehrist*." Mr. Hallett does not say why the plaintiff should not have been pleased to call it a *doul fehrist*, nor does he suggest any other appropriate name by which it ought to be called. But the use

<sup>1</sup> JACKSON and McDONNELL, J.J.



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of it is to be found in the judgment of the Moonsiff. He says: "From the testimony of the plaintiff's witnesses, who are trustworthy persons and proprietors of the mouzals, as well as from that of the Putwari, the writer of the *doul*, it is fully proved that the *doul* was prepared correctly and faithfully, and that it was accepted by all the tenants," and there was evidence which the Moonsiff accepted to show that rent had been collected from the ryots afterwards in accordance with the *doul*. Therefore, we understand the *doul* was merely a memorandum or record of the zemindar's agents of the rent which had been settled between the zemindar and the ryots, and that the various ryots affixed their signatures to this *doul* in testimony of their admission of the correctness of the jumma therein recited as having been imposed on them. The *doul* was not in itself a contract. It was no more a contract than are chittas or measurement papers, or what are called *surathalic* papers which are constantly signed by ryots, monduls, and other persons in testimony of their concurrence. It appears to us that there is nothing in the law to require a *doul fehrist* to be either registered or stamped, nor on the other hand is it a document which could be regarded as binding or conclusive evidence of a contract. It is a matter of observation to be made to, and explained by, any ryot who, having put his signature to it, afterwards disputes the facts which it recites; it may fairly be asked—How came you to sign this document if you were not a consenting party to it? It seems to us, therefore, that the Judge was wrong in saying that the document was inadmissible, and that he ought to have taken it into consideration together with the other evidence. The case will be remanded to the lower Appellate Court accordingly.

## [CIVIL APPELLATE JURISDICTION.]

SOOBA BEEBEE . . . . . DECREE-HOLDER ;  
 AND  
 FUKURUNNISSA BEGUM AND OTHERS . JUDGMENT-DEBTORS.

1878  
 January 4.

*Appeal from order—Party to the suit—Act XXIII of 1861, section 11.*

The alleged, but not proved, transfer of a decree does not, by his merely applying for execution of the decree, constitute the alleged transferee a party to the suit within the meaning of section 11, Act XXIII of 1861; and therefore such applicant has no right of appeal from an order rejecting the application made by the Court which passed the decree.

*Huro Loll Dass vs. Soorjawut Ali*, 8 W. R., 197, discussed.

*Abidunnissa Khatoon vs. Amirunnissa Khatoon*, I. L. R., 2 Cal., 327 ;  
 L. R. 4 Ind. App., 66, followed.

**R**EGULAR APPEAL from an order passed by the Subordinate Judge of Dacca.

The judgment appealed from is as follows :—"The decree-holder, Sooba Beebee, has applied for execution of this decree in virtue of a purchase said to have been made by her at an auction sale; but the decision of the High Court, dated the 6th of January 1875, a copy of which has been filed in this case, clearly shows that on an appeal preferred by Sooba Beebee against a decree of this Court passed in the suit in which one Fukurunnissa Begum was plaintiff and the present decree-holder, and the judgment-debtor were defendants, the Honorable Court has finally decided that Sooba Beebee did not purchase this decree, but was a mere *furzee*. Under such circumstances it is clear that Sooba Beebee is not entitled to take out execution of this decree. The application will, therefore, be disallowed with costs."

The applicant appealed, and the question then arose whether an appeal would lie. This depended on whether Sooba Beebee was a party to the suit within the meaning of section 11, Act XXIII of 1861.

Baboo *Mohiny Mohun Roy*, for Appellant.

Moonshee *Serajul Islam*, for Respondent.

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SOOBA  
BEEBEE

v.

FUKUBUN-  
NISSA BEGUM  
AND OTHERS.*Judgment.*

WHITE, J.

The following judgments were delivered by the High Court<sup>1</sup> :

WHITE, J. :—

The appellant in this case applied under section 208 of the Civil Procedure Code of 1859, for leave to execute a decree which she alleged she had purchased at an auction sale. The Court below, taking into consideration a certain judgment that had been passed by this Court in a suit to which the present appellant was a party, has decided that she is not entitled to take out execution of the decree, and accordingly has refused her application.

Now, by the 364th section of the Code, no appeal lies against this order, unless an express provision can be found in the Code which allows of an appeal. The only express provision is contained in section 283 of the Code. This section has been repealed by Act XXIII of 1861, and section 11 of the latter Act has taken its place. Hence, unless the appellant has a right of appeal under section 11 of Act XXIII of 1861, she cannot carry the case further, as far as the present suit is concerned. The only part of section 11 which we need consider is that which directs that “questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit, and the order passed by the Court shall be open to appeal.” It is perfectly clear that Sooba Beebee, the appellant, is not technically a party to this suit. She purchased, according to her statement, the decree on the 16th July 1870, and afterwards applied to be made a party, but her application was refused.

It is argued, however, upon the authority of a decision in 8 W. R., 197—*Huro Loll Dass vs. Soorjawut Ali*, that, although she has not been made a party to the suit she is yet within the meaning of the 11th section of Act XXIII of 1861, because she has by her purchase become the assignee of the decree, and, as such, is entitled to be made a party. We think that the decision in 8 W. R., 197, must be limited to cases in which there is no dispute as to the assignment of the decree having taken place, or as to the representative character of the parties who claim

<sup>1</sup> WHITE and MITTER, J.J.

to execute the decree. If that decision had any more extensive application, it must now be considered as controlled by a recent decision in the Privy Council in the case of *Abidunnissa Khatoon vs. Amirunnissa Khatoon*, I. L. R., 2 Cal., 327 ; L. R., 4 Ind., App. 66. Their Lordships, in dealing with that case which, in principle is substantially the same as the present, and in considering the judgment of the late Chief Justice of this Court,<sup>1</sup> expressed their concurrence with the view which he had taken, viz., that the 11th section of Act XXIII of 1861 was not intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree. Their Lordships further said, that it is clear section 208, Act VIII of 1859 does not apply to a case of that character, and the party would not be entitled, upon an application under that section, to be made a party to the suit ; and, therefore, could not be considered as coming within the meaning of section 11, Act XXIII of 1861. That there is a serious contest in this case as to the party who is entitled to be considered as the real transferee of this decree, there cannot, we think, be a shadow of doubt ; for it appears upon the proceedings that the purchase was originally made by a mookhtar, *benamee* for somebody else. Who that "somebody else" is, whether the present applicant or not, appears to have been the subject of litigation, and is not yet finally determined. The certificate of sale was issued in the name of Fukurunnissa, one of the defendants. She has tried to establish her title, and has failed. Her case came before this Court in 1875, in a suit to which the present applicant was a party ; and this Court, whilst negating Fukurunnissa's claim, pronounced a very strong opinion that the present appellant had no title to be considered a *bonâ fide* transferee of the decree, but that a third person was really the *bonâ fide* purchaser of the decree. It is not necessary here to determine who is the real *bonâ fide* transferee. It is sufficient to say that it is a question which admits of very considerable doubt.

It appears to us, therefore, that the appellant has neither become a party to the suit, nor has such a title to be made a party as that she can be treated as coming within the provisions of section 11, Act XXIII of 1861. That being so, by force of section 364 of

<sup>1</sup> Reported in 20 W. R., 305.

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—  
Judgment.  
—  
WHITE, J.

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 AND OTHERS.

—  
*Judgment.*

—  
 MITTER, J.

the Code of 1859, she has no right of appeal ; and her case, so far as the proceedings in this suit are concerned, must rest where it is left by the lower Court. The appeal, therefore, will be dismissed with costs.

MITTER, J. :—

I am also of the opinion that in this case Sooba Beebee has no right of appeal. She applied under section 208, Act VIII of 1859, as transferee, to execute a decree which was obtained by a third party, and which, she alleged she had purchased in execution of a decree against that third party. For reasons stated in the judgment of the lower Court, her application to execute the decree as a transferee under section 208 of the Procedure Code of 1859 has been refused. The question before us is whether this order is open to appeal under section 11 of Act XXIII of 1861. As it has been pointed out by my learned brother, section 364 of the Code distinctly prohibits appeal, unless there is an express provision in that Code. The contention of the appellant is that such express provision is to be found in the section mentioned above, viz., section 11 of Act XXIII. of 1861. The Privy Council, in the case already quoted, have distinctly decided against that contention. They, after referring to the fact that the case before them was not a case in which the Court executing the decree should have entertained an application under section 208, observe that " they are further fortified in this view by the consideration that, under section 364 of this Act, no appeal would lie from any judgment or decision given in a proceeding under section 208." They have, therefore, distinctly held in that case that no appeal lies from any judgment or decision given in a proceeding under section 208 of Act VIII of 1859. One of the reasons given by their Lordships for coming to this conclusion is that an applicant who applies to be put upon the record, on the ground that he has acquired a title to the decree by transfer, is in no sense a party to the suit unless his application is actually granted. Referring to the position of the applicant in that case, they say : " He was not on the record when judgment was given, nor when the decree was made. He subsequently applied for execution of the decree, but it appears to their Lordships impossible to say

that a person by merely applying for execution of the decree thereby constitutes himself a party to the suit." The same observations will apply here. An alleged transfer does not, by merely applying for execution of the decree, constitute one a party to the suit. I am, therefore, of opinion that in this case the judgment of the lower Court, under section 208 of Act VIII of 1859, is not open to appeal.

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AND OTHERS.Judgment.MITTER, J.

## [ORIGINAL CIVIL JURISDICTION.]

1878  
January 28.

KEDAR NATH DUTT . . . . . PLAINTIFF ;  
AND  
SEEVA VEYANA RANA LUCHMUN }  
CHETTY . . . . . } DEFENDANT.

*Arrest before Judgment—Property within jurisdiction.*

The words “any portion of his property” in the latter part of section 483 of the New Code of Civil Procedure, Act X of 1877, mean any portion of the property of the defendant which is within the jurisdiction of the Court in which the suit is pending.

**T**HIS was an application on behalf of the plaintiff for attachment before judgment of property belonging to the defendant, situated in Madura in the Presidency of Madras, under section 483 and section 648 of the New Code of Civil Procedure, Act X of 1877.

The application was supported by an affidavit which stated that the defendant, whose home was in Madras, had, after his arrival in Calcutta, entered into a contract with the plaintiff, whereby he agreed to supply certain goods; and that, having failed to perform his part of the contract, he had left the jurisdiction of this Court for Madura, taking all his property with him.

*Piffard*, for the Plaintiff.

This application comes clearly within section 483. Under that section, if the defendant has gone away leaving property within the jurisdiction of the Court within which the suit is pending, the Court may order “any portion of his property” to be attached. Now, “any portion of his property” does not mean any portion of the property of the defendant which is within the jurisdiction; for in that case the Legislature would have so expressed itself, or would have used the apt expression, “any portion of *such* property.” Not being limited in any way, the word “property” must be taken, as it stands, to mean any property whatever

belonging to the defendant, especially when we see that the Code provides for the attachment of property situated without the jurisdiction. This being the case, if we read section 483 and section 648 together, two conclusions at once follow :—(1) that if a defendant has gone away leaving property within the jurisdiction of this Court, in which the suit is pending, this Court may order the attachment of that property ; and (2) that this Court may send a copy of the order to the Court within whose jurisdiction there is any other property of the defendant, and have that property attached. Where, as in this case, the defendant has no property within the jurisdiction of the Court within which the suit is pending, the first of the above conclusions, of course, does not apply. But that does not invalidate the second one which is not necessarily dependent on it. This Court may still send a copy of the order to the Court at Madura, and cause to be attached the property there which belongs to the defendant.

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 LUCHMUN  
 CHETTY.  
 —  
*Argument.*

PONTIFEX, J. :—

PONTIFEX, J.

I am against Mr. Piffard on the construction of section 483. The words of that section, which must be read strictly, are as follows :

“ If at any stage of any suit the plaintiff satisfies the Court by affidavit that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,

“(a) is about to dispose of the whole or any part of his property or to remove the same from the jurisdiction of the Court in which the suit is pending, or

“(b) has quitted the jurisdiction of the Court, leaving therein property belonging to him,

“ the plaintiff may apply to the Court to call upon the defendant to furnish security to satisfy any decree that may be passed against him in such suit ; and, on his failing to give such security, to direct that any portion of his property shall be attached until the further order of the Court.”

In the first place, the defendant does not fall within clause (b). He has not quitted the jurisdiction of this Court leaving any property within the jurisdiction. The word “ property ” in the latter part of the section means the property mentioned in the first



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SERVA  
VEYANA RANA  
LUGHMUN  
CHETTY.  
—  
PONTIFEX, J.

part of the section in clauses (a) and (b). It means property within the jurisdiction. Section 477 also applies to property within the jurisdiction of the Court. I am bound to construe the section strictly, and must refuse the application.

*Application refused.*

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## [CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF CAPTAIN MICHELL . . PETITIONER.

1878  
January 24.

*Bank note—Stolen Property—Goods—Contract Act—Right of appeal by complainant, the robbed person—Code of Criminal Procedure, sections 286, 418, 419.*

A Government currency note stolen from A was cashed with B. The thief was tried and convicted for the theft, and after this conviction the Magistrate ordered the note to be returned to B : *Held*, that the Sessions Judge was, under section 419 of the Code of Criminal Procedure, the proper person to deal with an application made by A for the reversal of that order.

Where a stolen currency note has been delivered to a *bond fide* holder for value, the Court will not, on conviction of the thief, restore the note to the person from whom it was stolen.

A Government currency note is not "goods" within the meaning of the Contract Act.

THIS was a case referred to the High Court, as a Court of Revision, by the Sessions Judge of the 24-Pergunnahs. The facts of the case are set forth in his memorandum, which is as follows :—

*Statement.*

"This is an application questioning the propriety of an order passed by the Joint Magistrate under section 418 of the Code of Criminal Procedure, by which a currency note of Rs. 100, found to have been stolen from Captain Michell, has, on conviction of the thief, been given to Subal Chunder Poddar (with whom it was cashed by the thief), rather than to its original owner.

"When this application was first made to me I thought that, having regard to the terms of section 419, the petitioner had the right of appeal; but on re-consideration, I am of opinion that no appeal lies merely from such an order. There is no express

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 IN THE  
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 MICHELL,  
 Petitioner.  
 —  
*Statement.*

provision of law allowing an appeal against a mere order under section 418, and therefore it would seem that, under section 286, no appeal can be entertained. The terms of section 419 would seem to refer to a case in which an appeal has been lawfully made against an order of conviction or acquittal, and an order under section 418 being a part or consequence of such order, it thus comes under consideration by the "Court of Appeal, Reference or Revision," which is empowered to order that order to be stayed, and may modify, alter or annul it. In this view of the law, as the application made to me concerns only the matter dealt with under section 418, I am of opinion that I am not competent to interfere as a Court of Appeal; but as I am also of opinion that the order of the Joint Magistrate is contrary to law, I submit the case for the orders of the Honourable High Court.

"As far as the evidence goes there is no reason to doubt the honesty of the Poddar with whom the currency note was cashed by the thief. The question is, whether the Poddar should be allowed to retain it as against its original owner from whom it was stolen. It seems to me that this is a matter which can properly be dealt with by a Magistrate, but that the order passed by the Joint Magistrate, though it is in accordance with the principles of the law of England, is not in accordance with section 108 of the Contract Act. Currency notes would seem to be "goods" within the definition given in section 76 of that Act, and therefore this case is similar to that given in illustration (a) to section 108.

"I think it right, however, to state that the case of *The Collector of Salem* (reported in 7 Madras, 233) would seem to lay down a different view of our law, but in that case the position of Government was alone under consideration, and the judgment seems to have proceeded on the ground that under the law the Government Treasury Officer was bound to cash a currency note; and that therefore the Government was protected against any claim if it should happen that a note so cashed was a stolen note. In the present case there was no such obligation on the Poddar, and though the result of an order directing him to give it up to the person from whom it was stolen would seem to be somewhat unreasonable, it is, in my opinion, in accordance with our law in

India, and therefore I feel bound to submit the matter for the orders of the Honourable High Court."

The judgment of the Court<sup>1</sup> on the matter submitted is as follows :—

We think the Sessions Judge might have disposed of this case under section 419 of the Criminal Procedure Code without a reference to this Court. The words "Court of Appeal" in that section are not necessarily limited to a Court before which an appeal is at the moment pending. It may very often happen, as in this case, that the question of the propriety of an order, under section 418, for the disposal of any property produced before the Court, may in no way concern the convicted person, and we think it unreasonable to put such a construction on section 419 as shall make the power of the Judge to modify, alter, or annul a Magistrate's order affecting one party contingent on the accident whether another party has or has not chosen to appeal.

Section 286, by the words "except in the cases provided for by this Act," must include cases in which the power to alter or annul the order of a Magistrate is expressly given.

We are further of opinion that the case does not call for our interference. It is admitted in the order of reference that the note came honestly into the hands of the Poddar to whom it has been returned by the Magistrate. The Sessions Judge refers to section 108 of the Indian Contract Act, and to the definition of "goods" in section 76 of the same Act, in which, for the purposes of that particular Chapter, dealing with contracts of sale, the word is defined.

No one has appeared to argue the points raised before us. As at present advised, we are of opinion that the provisions of the Contract Act do not apply to this case. The change of a Government currency note for money is no more a contract of sale than the payment of the same note over the counter for goods is a sale of the note for the goods; in this last case the note is paid as money being legal tender for the amount expressed therein under section 15, Act III of 1871. Section 77 of the Contract Act defines sale to be the exchange of property

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MATTER OF  
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MICHELL,  
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—  
Judgment.

<sup>1</sup> AINSLIE and McDONELL, J.J.

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~  
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MATTER OF  
CAPTAIN  
MICHELL,  
Petitioner.  
—  
*Judgment.*

for a price; but this is the exchange of money in one form for money in another form. Either form being a legal tender, it is impossible to say that one is the price of the other. If we are to look to section 76 of the Contract Act, we must read it with section 77, and this latter section shows that the provisions of that Act do not apply in this case.

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## [CIVIL APPELLATE JURISDICTION.]

SHAM NARAIN SINGH . . . . . DEFENDANT ;

1877  
December 21.

AND

RUGHUBUR DYAL . . . . . PLAINTIFF.

*Mitakshara Law—Ancestral immovable property—Alienation—Foreclosure.*

Discussion of what constitutes ancestral immovable property under the Mitakshara Law.

Up to the time of the foreclosure becoming absolute, the interest of the vendee by conditional sale amounts only to securing his money. He has the land, but he has it simply as security. The effect of the foreclosure is (it is believed) to put an end to the conditional sale and make the property the immovable property of the person who advanced the money, from the date of the conditional sale.

*Girdharee Lall vs. Kantoo Lall*, 22 W. R., 56, stated.

**S**PECIAL APPEAL from the decree of the Officiating Judge of Patna reversing that of the Subordinate Judge.

The property in dispute in this case was mortgaged to Brij Lal Sahu, the father of Ram Buksh, who was the father of plaintiff, on the 20th of February 1847, by a deed of conditional sale which was afterwards made absolute by foreclosure. The property was afterwards sold by Ram Buksh to Sheo Dyal, one of the defendants, for Rs. 11,000, on the 9th of June 1857. The question was, whether the sale of the property made by the plaintiff's father, Ram Buksh, was void as against the plaintiff, on the ground that the property was ancestral immovable property, and that the sale was not justifiable. The parties were subject to Mitakshara Law.

The lower Court dismissed the suit, having incorrectly put on the plaintiff the burden of showing that the sale was illegal and void. This decision was reversed on appeal on the ground that the defendant had not shown that the sale was justifiable.

Baboo Chunder Madhub Ghose and Baboo Rajendro Nath Bose, for Appellant.

Mr. R. E. Twidale and Moonshee Mahomed Yusuf, for Respondent.

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The judgment of the Court<sup>1</sup> was delivered by

SHAM NARAIN

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DYAL

*Judgment.*

KENNEDY, J.

KENNEDY, J. :—

As I understand, three points have been argued on behalf of the special appellant. The first question which he raises is with respect to the nature of the property which is claimed by the plaintiff.

The special appellant contends that in truth this is not ancestral immovable property. We are, however, of opinion that it must be treated as being ancestral immovable property.

The ancestor, Brij Lall, acquired this property by a deed of conditional sale. Now, it has been held, and I have no hesitation in saying, with perfect correctness, that, up to the time of the foreclosure becoming absolute, the interest of the vendee by the conditional sale amounts only to securing his money. He has the land; he has it simply as security. We must remember, however, that from the beginning it was not so. Originally, it was really a conditional sale, which became absolute on the expiry of the limited term. Legislation intervened, and by the regulation, that which was by itself ripening into an absolute estate in land became converted into something which remained conditional until foreclosure proceedings were adopted; but if it were necessary for me to decide this point, I should strongly be inclined to think that the effect of the foreclosure would be to put an end to the original conditional sale, and to make the property the immovable property of the person who advanced the money from the commencement. However, I do not think it necessary here to decide that, for we find a most careful abstention by the defendants in their written statement, from alleging that the proceedings which converted the interest in the property into an absolute interest were taken by Ram Buksh. Para. 3 of the defendants' written statement says that, "though the deed of conditional sale, dated the 20th February 1847, was executed in favour of Brij Lall Sahu, father of Ram Buksh Sahu, yet the property in suit had not become the right and interest of the plaintiff's grandfather during his lifetime. Eventually, Ram Buksh Sahu, father of the

<sup>1</sup> AINSLIE and KENNEDY, J.J.

plaintiff, instituted a suit, and with great labor, expense, and exertion acquired the property in suit." Evidently this refers only to the proceedings for possession which invariably follow upon the foreclosure which converts a conditional into an absolute sale, and therefore, I think that the property, having been in the hands of Brij Lall, whether subject to the right of redemption or not, the defendant appellant would be bound to show that when it came into the hands of Ram Buksh it was not immovable property. That he has certainly failed to do on the face of these proceedings; and I am now informed that, on the face of the proceedings, it appears that the foreclosure proceedings were in fact taken by Brij Lall. I do not at all see that, even if movable property came into the hands of a descendant, and was converted into immovable property, that would not be an immovable ancestral estate. I do not know of any authority which shows that the meaning of an immovable ancestral estate is an ancestral estate which has descended in immovable form. I am inclined to think that it includes an ancestral estate, no matter whether it descends in movable or immovable form.

The next point which has been raised is, that this money was applied for the purpose of carrying on a business which was for the benefit of the joint family. Now, if that had been ancestral business, I should have had little difficulty in holding, as it has been determined, at least on the original side of this Court, that it is a part of the ancestral property which the descendant is bound to keep up, and to the support of which he may apply all the ancestral assets, but it appears quite clear that this was not an ancestral business, but the separate business of Ram Buksh which he transacted during the lifetime of his father; and, therefore, though it may have been for the benefit of Ram Buksh, who was a member and *kurta* of the joint family, it is quite clear that it was not for the benefit of the joint family.

Again, it has been suggested that, as this was a case in which there had been a suit for recovery of property, that which is recovered becomes the separate property of the recovering member of the family. In the first place, the principal passage from the Mitakshara read by the pleader for the appellant only speaks of recovery had with the consent of the other members of the

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Judgment.

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 ———  
*Judgment.*  
 ———  
 KENNEDY, J.

family. In the next place, it only refers to a partition amongst brothers; and I do not think it has derogated from the ancestral character of the property, although it may be enjoyed separately. In the third place, this is not such a recovery as is meant in the Mitakshara. The property was left in the hands of the mortgagor according to the ordinary meaning of the contract, and a suit after foreclosure proceedings is little more than a matter of form.

There was another point raised by the appellant, namely, that the Judge was wrong in making a distinction between the purchase in this case and the case of sale for a discharge of debts. In our opinion the Judge was perfectly right. The decision of the Privy Council referred to by him<sup>1</sup> clearly applies to cases of debts, and its reasoning applies to no other.

The appeal must be dismissed with costs.

<sup>1</sup> *Girdhars Lall vs. Kantoo Lall*, 22 W. R., 56; 14 B. L. R., 187; Law Rep., 1 Ind. App., 321. The remarks of the Judge, referred to by the Court are: "The Privy Council's decision, reported in 22 W. R., 56 does not, in my opinion, apply to a case of this kind. That decision refers to a case in which alienation was made to satisfy certain debts, and it was held that such alienation would be valid unless it be shown that the debts were contracted for an immoral purpose. But in the present case there is no allegation that the alienation was made for the purpose of satisfying debts, or for any necessary purpose whatever."

## [CIVIL APPELLATE JURISDICTION.]

CHATTERDHARY LALL . . . . . DECREE-HOLDER ;

AND

RAM BELASHEE KOOR AND OTHERS . OPPOSITE PARTY.

1877  
December 21.  
—*Appeal—Security for Costs—Execution—Act VIII, 1859, sections 204, 342.*

Where security is demanded and taken, under Act VIII of 1859, section 342, before decree, for the purpose of securing to the respondent his costs in the event of his being successful, the security may, under Act VIII of 1859, section 204, be enforced against the surety or his representatives, in execution of the decree dismissing the appeal.

Procedure to be followed in such cases stated.

*Ram Kishen Dass vs. Hurkhoo Sing*, 7 W. R., 329, and *Gujendro Nath Roy vs. Hemanginee Dass*, 13 W. R., 35 ; 4 B. L. R., 27, *App.*, cited and distinguished.

**R**EGULAR APPEAL against an order of the Subordinate Judge of Tirhoot.

On the 6th of April 1875, the High Court ordered that the appellant in the appeal of *Mohabeer Pershad vs. Chatterdhary Lall*, then pending in this Court, should give security for costs. Brojo Coomar Singh, as surety for the appellant, gave a bond hypothecating certain property. The appeal was dismissed with costs on the 28th of February 1876. Chatterdhary Lall then applied for execution for his costs against the representatives of Brojo Coomar Singh, deceased, but the Subordinate Judge refused the application on the ground that the decree of the High Court dismissing the appeal was made against Mohabeer Pershad and not against the surety.

Baboo *Rajendro Nath Bose*, for Appellant.

The respondent did not appear.

The judgment of the High Court ' was delivered by

AINSLIE, J. :—

AINSLIE, J.

It appears to us that this case is clearly distinguishable from

<sup>1</sup> AINSLIE and KENNEDY, J.J.

1877  
CHATTER-  
DEARY LALL  
v.  
RAM BELA-  
SHEE KOORE  
AND OTHERS.

*Judgment.*

AINSLIE, J.

*Ram Kishen Dass vs. Hurkhoo Sing*, 7 W. R., 329, and *Gujendro Nath Roy vs. Hemanginee Dassess*, 13 W. R., 35 ; 4 B. L. R., 27, App., in which it was held that section 204 does not apply to parties who have become sureties after the decree.

In the present case, the security was demanded and taken, under section 342, before the decree, for the purpose of securing to the respondent his costs in the event of his being successful.

The case must, therefore, go back to the Subordinate Judge, in order that he may allow execution to proceed against the sureties ; but before doing so, it will, of course, be necessary that the decree-holder should give the surety notice of his intention to proceed against him, instead of proceeding against the original judgment-debtor : he should be served with notice to show cause why the decree should not be executed against him.

We may also observe that in this case the original surety appears to be dead. It will, therefore, also be necessary, unless it has already been done in the earlier stage of the proceedings, to issue a notice under section 216, before any steps are taken for enforcing the decree against the respondents. The appellant will get his costs in this Court.

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**[CIVIL APPELLATE JURISDICTION.]**

GOPEE NATH DOBAY . . . . . JUDGMENT-DEBTOR;      1877  
AND      December 21.  
ROY LUTCHMEEPUT SINGH AND } DECREE-HOLDER AND  
ANOTHER . . . . . } PURCHASER.

*Sale in Execution of Decree—Postponement Notice—Proclamation—Act VIII of 1859, sections 249, 256.*

Where a sale in execution of a decree, fixed for a certain date, is postponed to another day, all the formalities required by Act VIII of 1859, section 249, should be gone through afresh, unless these have been waived by consent of the parties.

Absence of notice of postponement is presumptive evidence of substantial injury within the meaning of Act VIII of 1859, section 256.

*Obhoy Chunder Dutt vs. Erskine & Co.*, 3 W. R., 11 Mis., cited and followed.

**REGULAR APPEAL** from an order of the Judge of the District  
of Shahabad.

This was an application to set aside a sale in execution of a decree. The main ground of the application was, that the sale, which had been fixed for the 6th of November 1876, was postponed without notice of proclamation to the 14th of December 1876; and that, in consequence, the property was sold for one-sixth of its value. The Judge rejected the application; and the applicant, the judgment-debtor, appealed.

Baboo *Mohiny Mohun Roy*, Baboo *Gooroo Doss Banerjee*, and Baboo *Saligram Singh*, for Appellant.

**Baboo Sreenath Dass, for Respondents.**

The judgment of the High Court<sup>1</sup> was delivered by

**AINSLIE, J. :—**

**AINSLIE, J.**

It appears from the judgment of the Judge that the sale, which was fixed for the 6th November, was postponed to the 14th December,

<sup>1</sup> AINSLIE and KENNEDY, *J.J.*

1877  
 GOPPE NATH  
 DORAY  
 v.  
 BOY LUCH-  
 MEERUT  
 SINGH  
 AND ANOTHER.

*Judgment.*

AINSLIE, J.

not only without the consent of the debtor, but without any notice to him whatever. The Judge admits that the judgment-debtor was not represented in Court at the time. No proclamation under section 249 was made of the day to which the sale had been postponed. There was simply a notice put up in the Court-house, but no steps were taken to convey information of the change of day to intending purchasers in the mofussil.

The judgment of the late learned Chief Justice, Sir BARNES PEACOCK, in the case reported in 3 Weekly Reporter, 11 Mis., may be quoted as showing that in all cases in which a sale may be postponed to another day, it is necessary that the formalities required by law should be gone through afresh (unless it be that they have been waived by the parties themselves). He says: "It is exceedingly important that, when an auction sale is to take place in execution of a decree, a proclamation should be made giving notice of the day on which the sale is to take place, so that intending purchasers may go and bid for the articles put up for sale; and Act VIII of 1859 is express on the point." He then goes on to quote section 249. The case then before the Court was, no doubt, somewhat different from the present case, inasmuch as in that case the postponement had been indefinite; whereas in the present case the postponement was to a certain fixed day. Still, it appears to us the principle applies that in all cases the prescribed notice must be given, in order that intending purchasers may be able to attend and bid at the sale, unless the giving of such notice is specially waived. In the present case there was no such notice as required by section 249, though it had become necessary in consequence of the first notice having become inoperative otherwise than by the action of the parties to the suit.

With reference to the substantial injury arising from the irregularity, we think that we ought to hold that, as the law distinctly requires a notice, and as the notice is so important in order to secure a fair chance of a proper price being offered for the property to be sold, it may be presumed, when the notice is wanting, that there has been an absence of bidders, from which alone substantial injury to the judgment-debtor must, probably, have arisen.

There is some evidence, moreover, in the case that the property was sold for less than its actual value. The Judge has rejected that

evidence as untrustworthy, but we think that it should be read in the light of the presumption that probably there must be substantial injury for want of notice; and, therefore, some weight should be given to that evidence, unless it is clearly rebutted by evidence on the other side. There being no such rebutting evidence, we are bound to hold that there is sufficient proof of substantial injury.

The order of the lower Court must, therefore, be reversed, and the sale set aside, with costs payable by the purchaser respondent.

1877  
GOPEE NATH  
DOBAY  
v.  
ROY LUCH-  
MEEPUT  
SINGH  
AND OTHERS.  
*Judgment.*  
AINSLIE, J.

## [EXTRAORDINARY CRIMINAL JURISDICTION.]

1878  
January 18. RAJCOOMAR SINGH AND ANOTHER, } PETITIONERS;  
CONVICTS . . . . . }

AND

DINO NATH GHUTTUCK . . . OPPOSITE PARTY.

*High Courts' Act, section 15—Extraordinary powers of High Court—Right of Appeal in ordinary course.*

When there is the right of appeal provided by law, the High Court will not exercise its extraordinary power under section 15 of the High Courts' Act—all other remedies provided by law must be first exhausted.

THE petitioners, who had been sentenced by the Joint Magistrate of Serampore under section 147 of the Indian Penal Code each to three months' rigorous imprisonment, and also to give security in Rs. 100 to keep the peace for one year, made an application to the High Court, for the exercise of its extraordinary powers under section 15 of the High Courts' Act, and obtained a rule (WHITE and McDONELL, J.J.) calling upon the complainants to show cause why those orders should not be set aside.

*Branson and Hill*, for the Petitioners, referred to *The Queen vs. Piron Ayah*, 21 W. R., 64; 13 B. L. R., 4 App.

*J. D. Bell*, for the Opposite Party.

The following judgments were delivered by the High Court<sup>1</sup> :—

AINSLIE, J. AINSLIE, J. :—

Mr. Justice WHITE has expressed a wish that this matter should be disposed of by this Bench.

I am of opinion that this Court cannot interfere in the exercise of its powers of extraordinary jurisdiction unless every other remedy provided by law has been exhausted. The petitioner in this case clearly has the remedy of an appeal. Therefore, until that remedy has been resorted to, this Court, in the view I take of the proper

<sup>1</sup> AINSLIE and McDONELL, J.J.

application of section 15 of the High Court's Act, ought not to interfere. Whether under any circumstances it would do so, I need not say. The rule will be discharged.

I concur in the suggestion of my learned brother as to the propriety of admitting an appeal should the petitioners think fit to tender it, and in suspending the execution of the Magistrate's order for one week from this date.

1878  
RAJCOOMAR  
SINGH  
AND ANOTHER,  
Convicts,  
v.  
DINO NATH  
GHUTTUCK.  
Judgment.

McDONELL, J. :—

McDONELL, J.

I would only add that Mr. Justice WHITE entirely concurs in the view taken by my learned brother AINSLIE, and that had it been brought to our notice that there was an appeal, we should not have granted the rule. At the same time we think that the Judge would exercise a wise discretion if, under the circumstances, he would admit the appeal after time.

The applicants are at present on bail, and if they do not appeal within one week from this date the sentence will be carried out.



## [CIVIL APPELLATE JURISDICTION.]

1877  
December 21.

JOGESSUR SAHAI AND OTHERS . . JUDGMENT-DEBTORS;

AND

MUSSAMUT MURACHO KOOER, } DECREE-HOLDER.  
UNDER THE COURT OF WARDS . . . }

*Privy Council Appeal—Final Decree, Judgment, or Order—Code  
of Civil Procedure, Act X of 1877, section 595, cl. (a.)*

An order of the High Court directing execution to proceed is not a "final" decree, judgment, or order within the meaning of cl. (a.), section 595, of the Code of Civil Procedure, Act X of 1877.

**T**HIS was an application for leave to appeal to Her Majesty in Council from an order of the High Court directing the execution of a Privy Council decree.

In this case, which has frequently come before the Courts, the facts were as follows :

Ajoodhya Pershad and his four cousins (sons of his uncle) were a joint Hindoo family governed by the Mitakshara Law. Ajoodhya Pershad died without issue, leaving a widow. Of the four cousins Dukhinee Sahai, the eldest, left one son, Sudaburt Pershad ; the second, Sheo Gobind Pershad, left one son, Bhugwan Lall Sahai, who died without issue leaving two widows ; Khasee Nath Sahai, the third cousin, left a widow, Phoolbas Kooer, and one son, Hureenath Pershad ; the fourth cousin, Makhun Sahai, died without issue.

On the death of Bhugwan Lall, which happened some time in 1846, Sudaburt Pershad and Hureenath Pershad became the sole survivors of the joint Mitakshara family, and as such they became entitled to the whole of the family property.

Bhugwan Lall had died indebted to one Ruggonundun, and after his death Ruggonundun brought a suit and obtained a decree against the widows of Bhugwan Lall, as his representatives. Under this decree portions of the joint property were sold, the sale certificate purporting to convey only the right, title and interest of the widows, the judgment-debtors.

In the year 1862 Sudaburt Pershad brought a suit to recover possession of the joint family property sold under the decree against the widows, making his co-sharer, Hureenath Pershad, a defendant. (Hureenath Pershad, being then a minor, was represented in the suit by his mother, Phoolbas Kooer, and his title was admitted by Sudaburt Pershad.) In that suit Sudaburt Pershad obtained a decree for possession of his moiety of the joint family property.

Thereupon, Phoolbas Kooer, on behalf of her minor son, Hureenath Pershad, instituted a suit for the recovery of his moiety of the joint family property, making Sudaburt, who disclaimed, a defendant, and obtained a decree in the Court of First Instance. This decree was reversed by the High Court on appeal on the 18th of November 1870. (See 12 W. R., 1 F. B. ; 3 B. L. R., 31. F.B. ; see also 14 W. R., 339.)

Subsequently to the passing of the last mentioned decree, Hureenath Pershad attained full age, and the High Court, on being applied to, granted leave to both his mother and himself to appeal to Her Majesty in Council against it, and they did so—the record of the appeal being despatched to England on the 21st of December 1872. Shortly afterwards, Hureenath Pershad became a lunatic, his property passed under the management of the Court of Wards, and the Privy Council, on the 20th of November 1873, ordered that Moulvie Haji Syud Wuzzeeroodeen, manager under the Court of Wards of the estate of Hureenath Pershad, should be entitled to prosecute the appeal as such manager on behalf of Hureenath Pershad, and to take all necessary proceedings therein. Hureenath Pershad died on the 12th of April 1874, leaving a minor widow, Mussamut Muracho Kooer; and on the 5th of August 1875, the Privy Council ordered that the name of the Collector of Sarun, for and on behalf of Mussamut Muracho Kooer, be substituted on the record for the name of Hureenath Pershad, and that the appeal be revived and prosecuted in the name of the Collector of Sarun as next friend of Mussamut Muracho Kooer, who claimed to be the sole widow, heiress, and representative of Hureenath Pershad. A decree of the Privy Council, reversing the decree of the Calcutta High Court of the 18th of November 1870, and affirming that of the Court of First

1877

JOGHESUR  
SAHAI  
AND OTHERSv.  
MUSSAMUT  
MURACHO  
KOOER.*Statement.*

1877  
 JOGESSUR  
 SAHAI  
 AND OTHERS  
 v.  
 MUSAMUT  
 MURACHO  
 KOOR.

*Statement.*

Instance, was passed on the 1st of February 1876. (See 25 W. R., 285; I. L. R., 1 Cal., 226; L. R., 3 Ind. App. 7.)

On the 19th of July 1876, the Court of Wards, on behalf of Musamut Muracho Koor, applied to the Subordinate Judge of Sarun for execution of the Privy Council decree. This application was rejected by the Subordinate Judge on the ground that the property in dispute being joint family property, the widow of Hureenath Pershad could not recover possession thereof so long as the son of Sudaburt Pershad was alive; and that Musamut Muracho Koor, not being proprietor of any entire estate, the Court of Wards could not represent her. On appeal to a Division Bench of the High Court (JACKSON and WHITE, J.J.), this decision was reversed, the Court holding that 'their Lordships of the Privy Council considered the suit by Sudaburt making Hureenath a defendant, and the suit by Hureenath making Sudaburt a defendant, together with Sudaburt's disclaimer in the latter suit, to be sufficient evidence of a separation'; and that the lower Court was not competent to go behind the decree, as regards the substitution of names on the record of the Privy Council Appeal.

The judgment-debtors applied for leave to appeal to the Privy Council against the order of the Division Bench.

Mr. R. E. Twidale, for the Petitioner, the Judgment-Debtor.

Mr. H. Bell (Legal Remembrancer), and Baboo Unnoda Prasad Banerjee, for the Decree-Holder.

MARKBY, J. MARKBY, J.:—

In this case the present applicants having been originally defendants in a suit brought in this country, succeeded in obtaining the dismissal of that suit by this Court; but the Privy Council reversed that decision and gave a decree against the present applicants. The successful party then applied for execution, but the Subordinate Judge, for the reasons stated in his decision, refused to issue execution.

Against this order the decree-holder appealed to this Court, and this Court, reversing the decision of the Subordinate Judge,

<sup>1</sup> See 25 W. R., 285; I. L. R., 1 Cal., 226; L. R., 3 Ind. App. 7. See also Appovier's case, 11 Moore's Ind. App. 25.

ordered that the decree-holder should be allowed to issue execution. Against this order the judgment-debtors desire to appeal to the Privy Council.

There is no dispute that the property involved is of the value of Rs. 10,000 and upwards.

There is a decision of a Full Bench (*Mussamut Valsaty Begum* vs. *Rugghoonath Pershad*, 8 W. R., 147) that orders of this Court, made on appeal in reference to the execution of a decree, are appealable to the Privy Council.

But there is still a further and somewhat difficult question to consider in this case, namely, whether the appeal lies under clause (a) of section 595 of the Code of Civil Procedure, or under clause (c) of that section. If it lies under clause (c), in other words, if it is necessary that a certificate would be granted that the case is one fit for appeal, I should not think it right to grant such a certificate, but should leave the parties to make any such application as they might be advised direct to the Privy Council. The applicant, therefore, must rely upon clause (a).

Under that clause the party aggrieved has no right of appeal except against a "final judgment, decree or order," and it is argued by the Legal Remembrancer, who appears to show cause against this application, that the order of this Court directing execution to issue is not a final one, but only an order which initiates further proceedings. The word "final," it is contended, is used in contradistinction to "interlocutory" and "preliminary" which words occur in section 40 of the Letters Patent of 1865, and that by a "final" order is meant an order which terminates the proceedings in favor of one of the parties. The word "final" is capable of bearing a variety of meaning. It is used twice in clause (a) of section 595 of the Code of Civil Procedure, and once in section 597, but even in such close proximity it is made to carry two, if not three, different significations.

The construction, however, contended for is a very reasonable one when dealing with orders made prior to decree, which are only so many steps towards the ultimate decree, and which may well be called "preliminary" or "interlocutory," and in this sense not "final;" and it is quite reasonable to preclude the parties from appealing against such orders, because the

1877  
JOGESWAR  
SARAI  
AND OTHERS  
v.  
MUSSAMUT  
MURACHO  
KOOR.  
—  
Judgment.  
—  
MARKBY, J.

1877  
 JOGESSUR  
 SAHAI  
 AND OTHERS  
 v.  
 MUSSAMUT  
 MURACHO  
 KOOR.

*Judgment.*  
 MARKBY, J.

time must ultimately come when the party complaining of them may have his redress. If the case finally goes against him, he can then, if it is worth his while, contest the validity of any order made prior to the decree, which, in the eye of the law, comprehends all the previous steps by which it was arrived at.

But when one comes to deal with orders subsequent to decree, the case is different. An order that execution shall issue is not "final," in the sense above contended for; nor, on the other hand, is it "preliminary" or "interlocutory." If this order is not appealable now, it is extremely difficult to say that it will ever become so. Indeed, I do not know any meaning of the word "final" which can be applied to orders made subsequent to decree, so as to make this section work quite satisfactorily.

The decision of the Full Bench, above referred to, is not conclusive upon the point. Both sections of the Letters Patent by which the matter was then regulated were referred to, but it is not said under which of those sections orders of this class are appealable.

Of course, it is necessary to be careful when denying to a party his right of appeal, and the strong observations of Sir BARNES PEACOCK in the Full Bench case I have referred to have made me hesitate before putting such a construction on clause (a) of section 595 as will practically have that effect. Nevertheless, considering how vexatious the right of appeal against orders in execution might become if not placed under some restriction, I shall hold that the order of this Court directing execution to proceed is not "a final" decree, judgment, or order within the meaning of clause (a) of section 595 of the Code of Civil Procedure, and that the applicant cannot appeal to the Privy Council without special permission. As I am not prepared to give this special permission, the application will be refused.

It would be very convenient if the construction of this clause of the Code were finally determined by the Privy Council.

## [CIVIL APPELLATE JURISDICTION.]

RAM CHAND CHUCKERBUTTY . . DECREE-HOLDER ;  
 AND  
 MADHUB NARAIN ROY AND } HEIRS OF JUDGMENT-  
 ANOTHER . . . . . } DEBTOR.

1877  
 December 6.

*Application for Execution—Heirs of Judgment-debtor—Act VIII of 1859,  
 sections 203 210, 211.<sup>1</sup>*

Where an application is made and granted under section 210, Act VIII of 1859, and property is attached which is claimed by the heir as his self-acquired property, the Court should proceed under section 203, without requiring any fresh application to be made under that section.

**S**PECIAL APPEAL from an order passed by the Officiating Judge of Backergunge, affirming that of the Second Subordinate Judge of that District.

This was an application for execution of a decree against the representatives of the judgment-debtor. The application was granted, and under it certain property was attached and advertised. One of the representatives claimed the property as his self-acquired property. It appeared that, after the death of the judgment-debtor, this same property was attached and sold by another decree-holder in execution of a decree previously obtained against him ; and that the purchaser had re-sold it to the person who now claimed it.

The Court of First Instance allowed the claim, and refused to require the representatives to account for the property of the deceased which had come into their hands, on the ground that the application had not been made under section 203, Act VIII of 1859. The decree-holder appealed, but the appeal was dismissed ; he then brought this special appeal.

Baboo Kashi Kant Sen, for Appellant.

Baboo Rashbehari Ghose, for Respondent.

<sup>1</sup> Now re-enacted in sections 234, 252, Act X of 1877.

1877

The judgment of the Court<sup>1</sup> was delivered byRAM CHAND  
CHUCKER-

BUTTY

v.

MADHUB

NARAIN

ROY

AND ANOTHER.

*Judgment.*

MARKBY, J.

MARKBY, J. :—

Both the Subordinate Judge and the District Judge in this case appear to have thought that this application must fail, because it was made, not under section 203, but under section 210 of Act VIII of 1859. There is some little difficulty about understanding exactly the grounds of their decisions; but that is the way in which they have treated this case. But as a matter of fact, it makes very little difference, for the purposes of the case now before us, whether this application is under section 210 or 203, because, by section 211, when a decree is ordered to be executed against the legal representative, it is to be executed in the manner provided by section 203; and if no property belonging to the deceased person can be found, and it can be proved that property has come into the hands of the representative which he does not show to have been properly applied by him, the decree can then be executed against any other property of the legal representative to that extent.

It is perfectly true, as stated by the vakeel for the respondent, that there can be no execution against the legal representative's own property so long as there exists any property of the deceased out of which execution can be obtained. But it is certain in this case that some property of the deceased had come into the hands of the legal representative. That being so, it was necessary for the Court either to find affirmatively that there was property of the deceased out of which execution could be had, or to call upon the representative to show how he applied the property which came into his hands. But the Courts below have done neither of these things; and upon a mere suggestion that there may be in existence some property of the deceased available for the purposes of this execution, the application of the judgment-creditor has been refused.

The case will, therefore, go back for the Court below to find, first, whether there is any property of the deceased person out of which execution of this decree can be had; and if there be any such property, then, no doubt, it will be necessary for the judgment-

<sup>1</sup> MARKBY and MITTER, J.J.

creditor, in the first instance, to proceed against that property ; but if there be no such property, then it will be the duty of the Court to call upon this respondent to show how he has applied the property which came into his hands ; and, if he is not able to show that satisfactorily, then execution will issue against him personally to the extent of the property which came into his hands. Costs will abide the result.

1877

RAM CHAND  
CHUCKER-  
BUTTYv.  
MADHUB  
NARAIN ROY  
AND ANOTHER.*Judgment.*

MARKBY, J.



## [CIVIL APPELLATE JURISDICTION.]

1877  
December 18.

OBHOY CHURN MUSTAFI . . . . . CAVEATOR ;

AND

UMA CHURN MUSTAFI AND ANOTHER . . . PETITIONERS.

*Probate, Grant of—Execution of Will, Admission of.*

The fact that a contested will bears an endorsement stating that it was acknowledged by the testator before the Registrar, does not warrant a Judge in granting probate without any other evidence in support of the will, even though the caveator does not produce any evidence to impeach the will.

**R**EGULAR APPEAL from an order passed by the District Judge of Jessore.

In this case the testator admitted the execution of the will before the Registrar, and had the will registered on the day on which it was made, and an endorsement to this effect was made on the will by the Registrar. The respondent having applied for a grant of probate, the appellant entered a caveat and filed a petition of objection, but he did not appear at the hearing of the application. Probate was granted, the Judge dispensing with proof of the will.

Baboo *Grija Sunker Mozumdar*, for Appellant.

Baboo *Kashi Kant Sen*, for Respondent.

The judgment of the Court<sup>1</sup> was delivered by

MARKBY, J. MARKBY, J. :—

In this case the respondents propounded the will of one Gora Chand Mustafi for probate in the Court of the District Judge of Jessore. A petition of objection was filed on behalf of a member of the family, Obhoy Churn Mustafi, in which he denied the genuineness of the will chiefly on the ground that the testator was not conscious when he executed the will. The will was registered and bore the usual endorsements. There is an affida-

<sup>1</sup> MARKBY and MITTHER, J.J.

vit before us by the respondents that they were present in Court when the case came on for hearing with their witnesses, but that the Judge did not examine them, thinking it unnecessary to do so; and it appears in fact that, without examining any of the witnesses, the Judge pronounced in favour of the will; and an order for probate was granted to the respondents. As far as we can see, the objector had no witnesses in support of his allegations; and, therefore, if the District Judge had taken the evidence even of a single reliable witness in respect of the execution of the will by the testator, that would probably have been sufficient. But the District Judge was not justified in pronouncing in favour of this contested will and in issuing probate, simply upon the fact that the will had been registered and bore an endorsement stating that execution of the will had been admitted by the testator. Whether, where the will is executed by the testator in the presence of the Registrar, and this is shewn by the endorsement on the will, it might in any case, without further evidence, be presumed to be genuine, we need not now consider. In this case we think it necessary, though we very much regret that we are compelled to do so, to direct the Judge to take such evidence upon the validity of this will as the parties may tender. The Judge will return the evidence, with his finding thereon as to the validity of the will to this Court; and he will do this with the least possible delay. The petition for probate was filed on the 2nd June 1875, and this is a matter which ought to have been finally disposed of in the course of a few weeks.

1877

OBHOY  
CHURN  
MUSTAFI

v.  
UMA CHURN  
MUSTAFI  
AND ANOTHER.

—  
*Judgment.*

—  
MARKBY, J.

## [CIVIL APPELLATE JURISDICTION.]

1877  
December 5.

SHEIKH ASUD ALI KHAN . . . . . DEFENDANT;

AND

SHEIKH AKBAR ALI KHAN . . . . . PLAINTIFF.

*Co-sharers—Sole Possession—Adverse Possession.*

Exclusive possession by A, of property which originally had been admittedly joint, does not, *per se*, amount to adverse possession as against A's co-sharers. The Court should further ascertain whether A's exclusive possession was due to his title being really a separate one from the plaintiff's, and could not be accounted for by the fact of some arrangement having been come to at a previous time between the parties.

**A**PPEAL under the Letters Patent against a decree passed by Mr. Justice AINSLIE.

The judgment appealed from is as follows :

AINSLIE, J. AINSLIE, J. :—

The plaintiff in the present suit seeks to establish a right to a four and a half annas share in a tank situate in a talook belonging jointly to himself and the defendant. He alleges enjoyment of the profits and interruption of that enjoyment. These allegations have been found not to be established.

The defendant sets up a claim to hold this tank exclusive of and adversely to his co-sharers, for more than twelve years previous to the institution of this suit.

The Judge has found that it is situate within the joint talook. He has also found that the defendant has had actual enjoyment of this tank, and that it was re-excavated by his father ; but he appears to have overlooked this that, in a joint property, it may very well happen that there is sole possession of a particular portion of the property without a cessation of the ownership of the joint owners. It does not follow, as a matter of course, that occupation and enjoyment by one sharer is adverse to his co-sharers. It may be that, on the evidence, the Judge would be able to find that there has been an allegation of exclusive title and continuous

holding under such title by the defendants for a period which would exclude his co-sharers from advancing their claims ; but as the case stands, it appears to me that the judgment of the Judge does not go so far as this. It is, therefore, necessary to remand the case to him in order that he may determine on the evidence, not merely whether there has been sole possession by the defendant, but whether such sole possession has been, either from the nature of the case or from some distinct acts of denial of the rights of the co-sharers, such as to create an adverse title by prescription in favour of the defendant, and to put an end to the original joint ownership.

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 SHEIKH ASUD  
 ALI KHAN  
 v.  
 SHEIKH  
 AKBAR ALI  
 KHAN.  
 Judgment.  
 AINSLIE, J.

Baboo *Aukhil Chunder Sen*, for Appellant, contended that the judgment of the learned Judge was not law. Exclusive possession for more than twelve years being sufficient proof of adverse possession, if not rebutted.

Baboo *Pran Kisto Biswas*, for Respondent.

The judgment of the Court<sup>1</sup> was delivered by

GARTH, C.J. (BIRCH, J., concurring) :—

GARTH, C.J.

We think there is no ground for this appeal. It may be that when the case goes back to the Judge, he may find as he did before ; but what Mr. Justice AINSLIE has pointed out is very true, that the Judge does not appear to have taken into consideration the possibility of the defendant's apparently exclusive possession being consistent with the fact of the joint ownership between the parties still subsisting. It often happens that, by arrangement between co-sharers, a portion of the joint property remains for many years in the exclusive possession of one of them, and such possession is quite consistent with the continuance of the joint ownership. This is the case which the plaintiff seeks to establish here.

What the Judge ought to ascertain is, whether the exclusive possession by the defendant was due to his title being really a separate one from the plaintiffs, and could not be accounted for by the fact of some arrangement having been come to at a previous time between the parties. The appeal is dismissed with costs.

<sup>1</sup> GARTH, C.J., and BIRCH, J.

## [CIVIL APPELLATE JURISDICTION.]

1877  
December 5.

JOTENDRO MOHUN TAGORE . . . . . PLAINTIFF;  
AND  
AYMUN BEEBEE AND OTHERS . . . . . DEFENDANTS.

*Lakhiraj Lands, rent of.*

The right of a zemindar to exact from a tenant payment of rent for a certain piece of land, in no way depends on whether he does or does not pay revenue for that land.

**S**PECIAL APPEAL from a decision passed by the Judge of Midnapore, reversing a decree of the Sudder Moonsiff of that District.

This was a suit for a declaration of *mal right*, the defendants claimed the land as *lakhiraj*. It was proved that, from 1815 to 1869, a peshkush or quit-rent had been paid to the zemindar, though the land had always been called *lakhiraj*; and that in 1841 a decree was passed in a resumption suit, instituted by the Government against the ancestor of the defendants, releasing the lands from liability for the payment of revenue.

The Court of First Instance gave plaintiff a decree, which was set aside on appeal; the Judge holding that the zemindar's right to demand rent was based on his own liability to pay the Government revenue, and that the zemindar was not, of right, entitled to receive rent from the "grantees" of revenue-free lands. Plaintiff appealed.

Baboo *Srinath Das* and Baboo *Chunder Madhub Ghose*, for Appellant.

Moonshee *Mahomed Yusuf*, for Respondent.

The judgment of the Court<sup>1</sup> was delivered by

GARTH, C.J. GARTH, C.J. :—

We think that the District Judge has made a mistake in this case. He seems to think that because the zemindar pays no

<sup>1</sup> GARTH, C.J., and BIRCH, J.

revenue to Government for this particular land, the defendant cannot legally be the zemindar's tenant or liable to pay him rent. But the Moonsiff has found that, ever since the year 1815, the defendant and his ancestors have been paying rent to the zemindar down to the year 1869. We do not quite understand whether the Judge adopted that finding of the Moonsiff; but what he says is that, assuming it to be correct, the zemindar cannot, as a matter of law, be entitled to demand rent from the defendant, because he pays no revenue for the land himself. We do not see the force of this, and we think the Judge has made a mistake. The case must go back to him for re-trial; and he must decide upon the whole of the evidence, whether the plaintiffs are entitled to recover. The appellant must have the costs of this appeal.

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 JOTENDRO  
 MOHUN  
 TAGORE  
 v.  
 AYMUN  
 BEEBEE AND  
 OTHERS.  
*Judgment.*  
 GAETH, C.J.

## [CIVIL APPELLATE JURISDICTION.]

1877  
December 20.

ABBASSEE BEGUM . . . . . JUDGMENT-DEBTOR ;

AND

MAHARANEE RAJ ROOP KOOR . . DECREE-HOLDER.

*Decree—Application for stay of Execution—Act VIII of 1859, section 338.*

Application for stay of execution of a decree, an appeal from which has been filed, should, under Act VIII of 1859, section 338, be made to the Court of Appeal and not to the Court which passed the order under appeal.

**R**EGULAR APPEAL from an order of the Subordinate Judge of Gya.

This was an application made on the 30th June 1877, to the Subordinate Judge of Gya, for a stay of execution of a decree, from which the applicant had preferred an appeal to the High Court in the early part of the year 1876. The application was refused, and the applicant appealed.

Baboo *Nogendro Nath Roy*, for Appellant.

Moonshee *Mahomed Yusuf*, for Respondent.

The judgment of the High Court<sup>1</sup> was delivered by

AINSLIE, J. AINSLIE, J. :—

On the face of the petition of appeal it appears that a regular appeal was filed in this Court in the year 1876. Consequently, under the terms of section 338 of the Civil Procedure Code, the application ought to have been made to this Court, and not to the Court below.

The appeal must be dismissed with costs.

<sup>1</sup> AINSLIE and KENNEDY, J.J.

## [PRIVY COUNCIL.]

1877  
November 22.

NORENDUR NARAIN SINGH AND ANOTHER . PLAINTIFFS ;  
AND  
DWARKA LAL MUNDUR AND OTHERS . . . DEFENDANTS.

*Conditional Sale—Foreclosure—Service of Notice—Regulation XVII  
of 1806.*

In proceedings under Regulation XVII of 1806, section 8, the functions of the Judge are purely ministerial and not judicial. It is his duty to take certain proceedings as therein laid down and make a record of them; but he can give no judgment in any way binding on the parties, whose rights are regulated entirely by the Regulation itself.

*Forbes vs. Ameeroonissa Begum*, 10 Moore's Ind. App., 340; 3 W. R., 47, P. C., cited and approved.

The condition of foreclosure required by Regulation XVII of 1806, section 8, is that the mortgagor should be furnished with a copy of the petition, and should have a notification from the Judge, in order that he may, within a year from the time of such notice, redeem the property. In an action brought to recover possession as upon a foreclosure, it is essential for the plaintiff to satisfy the Court, by evidence, that the foregoing condition has been complied with.

*Syud Yusuf Ali Khan vs. Mussamut Azumtooisaa*, W. R., 1864, p. 49; and *Madho Singh vs. Mahtab Singh*, 3 Alla., 325, cited and approved.

It is doubtful whether the finding of the Judge, recorded by him in the proceedings upon the foreclosure petition, would be even *prima facie* evidence of the fact of service of notice.

Proof of service of notice on the parties entitled may be waived by an admission by them that the notice was properly served upon them at the time at which the mortgagee alleges it to have been, or that they had knowledge of it at a time which would have justified the foreclosure.

When the mortgagee seeks to foreclose he must discover and serve notice of foreclosure on the persons who are the then owners of the estate whether in possession or not. The purchaser of the equity of redemption, though not in possession, is therefore entitled to receive notice.

*Mohun Lall Sookul vs. Goluck Chunder Dutt*, 10 Moore's Ind. App. 1; 1 W. R., 19, P. C., quoted.



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NORENDUR  
NARAIN  
SINGH AND  
ANOTHER

v.

DWARKA LAL  
MUNDUR  
AND OTHERS.

Statement.

Where property, though held in certain shares, is mortgaged as a whole, the mortgagee cannot obtain a foreclosure of the whole of the estate, or of any part of it, upon a service on some only of the mortgagors.

The year during which the mortgagor may redeem his property runs not from the date of the perwannah or the issuing of it by the Judge, but from the time of service.

*Mohesh Chunder Sen vs. Mussamat Tarinee*, 10 W. R., 27, F. B.; 1 B. L. R., 14 F. B., cited and approved.

**A**PPEAL from a decree passed by a Division Bench of the High Court of Calcutta, (PHEAR and MORRIS, J.J.)

This was a suit for khas possession, and partition with mesne profits, after a decree for foreclosure of a mortgage alleged to have been obtained under the provisions of Regulation XVII of 1806, in the Court of the Officiating Judge of Bhaugulpore, on the 24th of September 1867. The plaint was filed in the Court of the Subordinate Judge of Bhaugulpore on the 1st of October 1872; and the suit was brought against the mortgagors, and against purchasers from them subsequent to the mortgage who are hereinafter called the Mundur defendants.

The mortgage (which was of undivided shares in joint property) was made by a deed of conditional sale to Rajah Tek Narain Singh (the ancestor of the plaintiffs), dated the 30th of November 1858, and executed by the proprietors of the shares. The amount mortgaged was one-third of the whole property, namely, 5 annas 3 gundas 1 cowri and 1 krant; and the deed declared that the conditional sale would become absolute in default of payment of the consideration money within two years from the date of the mortgage.

In 1861 a lease of six annas of the entire property was taken by Rajah Tek Narain Singh in the name of another party. This lease included the property mortgaged, but did not refer to the mortgage. In 1861 and 1863 Rajah Tek Narain Singh bought from the mortgagors portions of the mortgaged property and took possession of those portions. None of these conveyances refer to the deed of mortgage.

Rajah Tek Narain Singh died some time in 1865, and on the 29th of January 1866, his successors, the present plaintiffs,

presented a petition for foreclosure of the mortgaged property, exclusive of the portions which passed under the conveyances of 1861 and 1863. Notice was directed to be issued to the mortgagors, and on the 24th of September 1867, it was ordered that foreclosure of the mortgage be duly sanctioned, notwithstanding the objections of some of the mortgagors who declared that the deed was a forgery.

On the 15th of February 1867, the plaintiffs obtained a decree against some of the mortgagors for a debt of Rs. 87, in execution of which the mortgaged property was attached for the purpose of sale. Before the sale took place the Mundur defendants bought the property and paid off the decree-holders. Previously, in the year 1861, the Mundurs had bought another portion of the property, and at the time of the filing of the plaint in the present suit they were in possession of the whole of the property for which the plaintiffs sued; that is of the mortgaged property, excepting the portions of which Rajah Tek Narain Singh had obtained possession in 1861 and 1863 by virtue of the conveyances then executed.

The defence was : (1) that the deed of conditional sale was a fabrication ; (2) that the provisions of Regulation XVII of 1806, regarding service of notice of foreclosure, had not been complied with ; and (3) that the plaintiffs could not claim partition without making all the proprietors parties to the suit. The lower Court overruled these objections and gave plaintiffs a decree. The Mundur defendants appealed to the High Court, where the following judgment was delivered by

PHEAR, J. (MORRIS, J., concurring) :—

The plaintiff in this case says that, in November 1858, his ancestor purchased from certain vendors, called the conditional vendors, 5 annas 3 gundas 1 cowri and 1 krant share of Mouzah Mudhpore, subject to redemption by the vendors on repayment of the consideration money Rs. 5,000 ; and that he afterwards, between September 1861 and January 1868, purchased out and out from some of the mortgagors or conditional vendors their respective shares in the mortgaged property, amounting in the whole to 1 anna 15 gundas 2 cowries. These purchases must,

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 v.  
 DWARKA LAL  
 MUNDUR  
 AND OTHERS.

Statement.

1874  
 April 13.

Judgment,  
 High Court.

PHEAR, J.

1877

NORENDUR  
NARAIN  
SINGH AND  
ANOTHER

o.  
DWARKA LAL  
MUNDUR  
AND OTHERS.

*Judgment,  
High Court.*

PHILLIP, J.

of course, have been each subject to the mortgage of November 1858.

The plaintiff then says that in June 1867, he caused due notification of foreclosure to be given to the conditional vendors through the Bhaugulpore Civil Court; and that the mortgage money has not since been paid. And upon this title he brings this suit to obtain possession, not of the whole of the mortgaged property, but of the difference between the 5 annas odd originally mortgaged to his ancestor, and the 1 anna odd purchased by him subsequently to the mortgage; that is, of 3 annas 7 gundas 3 cowries and 1 krant.

The plaintiff also asks for partition in his plaint, but he does not say what share he wants to have divided from the remainder of the property, or who his co-sharers are. And, although he brings this suit, as I have mentioned, to recover possession of 3 annas 7 gundas 3 cowries 1 krant of the joint property, he does not say who of the defendants, 21 in number, are now enjoying this share or are keeping him from it, or even, whether or not, any of them are in possession of any portion of it; nor does he state any facts which would serve to connect any one of the defendants with the particular property or shares of property which are the subject of the mortgage.

Of these 21 defendants we are only concerned on this appeal with two sets, namely, one set, which may be termed Chooni Mundur's set, and the other Kunhya Lal Mundur's. Both these sets of defendants say that they are in possession of a certain share of this joint property, and they admit that they purchased what they have from some of the alleged mortgagors, a part of it at any rate after the date of the alleged mortgage deed. But they admit nothing more. Both of them object that the conditional sale was not a real transaction, even if it had existence at all, which they deny, and that they know nothing about the foreclosure.

Now it is quite plain on this state of facts that the plaintiff must, in order to make out a title to recover, first prove, not only that the property was mortgaged to him or to his ancestor, as he alleges it was, in 1858, but that he caused effective notification to be given to the representatives of the original mortgagors in

June 1867, the date when he says that he caused the notification to issue. But we find no proof of service of the notification upon the original vendors or their representatives anywhere in the record. The utmost that we find tending in this direction is a petition, which is said to have been filed on the occasion of the foreclosure proceedings, as they have been termed. Now this petition can at the most show that the petitioners themselves admit that they had notice of the foreclosure. It cannot be evidence of all the original mortgagors—other than the petitioners or their representatives—having had notice of the foreclosure. And if any one of the mortgagors or his representative was not duly served with notice then the plaintiff must fail to establish his title by foreclosure.

In this state of the case it is hardly, perhaps, necessary for us to mention that one of the original mortgagors, who was called as a witness, expressly states that notice of the foreclosure was not served upon him. It thus seems to be quite clear that the plaintiff has failed to take the very first step which he was obliged to take in order to prove his title to the property and the right to recover as against the appealing defendants.

But we further observe that even if he had proved that the foreclosure had been duly effected, he would still have to prove that the share of this joint property, which the appealing defendants admitted that they had got from some of the mortgagors, was in fact a share or a portion of a share of the joint property which was the subject of the original mortgage. But there is no attempt, as far as we can see, made by the plaintiff to prove this. It must be remembered that the property mortgaged was but a 5 annas 3 gundas odd share out of the 16 annas; and the whole of the remaining shareholders have not been brought before the Court, or rather I should say, none of them has been. There is, in truth, a total failure of proof that the plaintiff is entitled to recover the share of the joint-property which is in the hands of either of the two appealing defendants. It therefore follows that the plaintiff's suit ought to have been dismissed. We are of opinion that the decree of the Subordinate Judge is wrong and must be reversed; and as against the appealing defendants the suit must be dismissed with costs in both the Courts.

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NARAIN  
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AND OTHERS.

*Judgment,  
High Court.*

PHAR, J.

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AND OTHERS.

*Judgment,  
High Court.*

PHAR, J.

I intended to have mentioned, as a most important fact bearing upon the merits of the plaintiff's claim, that in the different transactions of purchase, which the plaintiff himself refers to, made by him or on his behalf between 1858 and 1868, there is no mention whatever of the conditional sale upon which the plaintiff now relies; yet, as I have already remarked, these sales must have been effected subject to that mortgage, if that mortgage had existed.

Plaintiffs appealed to the Privy Council on the grounds: (1) that the defects in the plaint should not have been taken to prejudice the plaintiff's case in the Appellate Court, when the defendants appeared, and in their written statement disclosed their case, and took issues and went to trial thereon; (2) that the Court was wrong in holding there was no proof of service of notice of foreclosure (3) that there was no dispute in the Court below that the share of which the Mundurs had possession was the share which was the subject of the original mortgage, the only question being whether the Mundurs took a good title in respect of their purchases.

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November 22.

The judgment of their Lordships (1) is as follows:—

This is an appeal in a suit brought by the heirs of Rajah Tek Narain Singh against certain parties, who may be described as the family of Dass, forming one set of defendants, and persons called Mundur who formed another set, the latter being purchasers of the property in question from the Dasses. The suit was brought for possession and for registration of names, (as stated in the plaint,) "with respect to 3 annas 7 gundas 3 cowries 1 krant out of 5 annas 3 gundas 1 cowri 1 krant, of Mouzah Dooram Mudehpore 'usli' with 'dakhili' Pergunnah Nesingpore Koora, the property referred to in the deed of conditional sale, after deducting 1 anna 15 gundas 2 cowries, the right and interest of Sri Narain Dass, Bachee Lal Dass, Rajah Ram Dass, Muhtab Dass, *alias* Laljee Dass, and Chuneelal Kishore Dass, purchased by your petitioner's ancestor, and the right and interest of Shunker Batti purchased at auction on the 10th of January 1868, subsequent

(1) Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

to acquiring the deed of conditional purchase, at an execution sale by your petitioner." The conclusion of the plaint is: "Since the principal and interest of the mortgage was neither deposited nor paid by the vendors pursuant to the terms of the mortgage bond, the foreclosure in accordance with Regulation XVII of 1806 was formally effected in the Judge's Court at Bhaugulpore by a proceeding dated the 23rd of June 1867, and the period of one year fixed by the above law expired on the 27th February 1868, and within that period the amount entered in the bond and interest were not paid, and the conditional sale aforesaid became absolute on the 27th of February 1868, corresponding with the 19th Falgoon 1275, F.S., and the cause of action for possession and mesne profit arose from the same date."

This action, therefore, is brought after proceedings for foreclosure had been taken upon the deed of conditional sale referred to in the plaint, and to give effect to those proceedings. This deed is dated the 30th of November 1858; it is from numerous members of the family of Dass, in all 19; the deed states that they had "sold and transferred all and every the 5 annas 3 gundas 1 cowri 1 krant of the entire 16 annas original with dependencies in Mouzah Dooram Mudehpore," in lieu of Rs. 5,000 which had been advanced by Rajah Tek Narain Singh. The further statement is: "We have received the consideration money in full in one lump sum in cash from the said vendee, and brought the same into our possession and enjoyment. We execute this deed of conditional sale for two years in lieu of the said consideration, and delivering it to the vendee hereby declare and give in writing that the said vendee shall enter into possession and occupancy of the property sold by right of purchase as proprietor. We promise that in the space of two years from the date of this deed of sale we shall pay the consideration money in question in cash in one lump sum to the vendee aforesaid, and take this deed of sale back. In case we do not repay the consideration in question, the vendee shall, after the expiration of the time, be at liberty to foreclose and complete the sale under the provisions of Regulation XVII. of 1806 A.D., and enter into possession and occupancy of the property sold, and to have his own name registered in the Government Records in the column of proprietor."

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 —  
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 Privy Council.*  
 —

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MUNDUR  
AND OTHERS.

*Judgment,  
Privy Council.*

It seems that the Rajah did not take possession, and no interest appears to have been paid or demanded until proceedings were taken after the Rajah's death by the present plaintiffs to foreclose the property, under the eighth section of Regulation XVII of 1806.

The first question which arises (being the question upon which the High Court have decided the case in favour of the defendants) is whether the directions in that section have been fulfilled. The High Court held that there was no sufficient proof of notification made to the defendants of the petition of the plaintiffs claiming foreclosure; and, that being the question, it will be right to look at the terms of the eighth clause. The enactment is: "Whenever the receiver or holder of a deed of mortgage and conditional sale, such as is described in the preamble and preceding sections of this Regulation, may be desirous of foreclosing the mortgage, and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition, to be presented by himself or by one of the authorised vakeels of the Court to the Judge of the Zillah or City in which the mortgaged land or other property may be situated. The Judge, on receiving such written application, shall cause the mortgagor or his legal representative to be furnished, as soon as possible, with a copy of it, and shall, at the same time, notify to him by a perwannah, under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive."

The condition of foreclosure required by that section is, that the mortgagor should be furnished with a copy of the petition, and should have a notification from the Judge, in order that he may, within a year from the time of such notice, redeem the property; and in an action of this kind, which is brought to recover possession as upon a foreclosure, it is essential for the plaintiff to satisfy the Court that this condition has been complied with.

It has been contended on the part of the appellant that it is

within the province of the Judge of the Zillah Court to determine whether the notice has been duly served or not; and, although it has not been urged, or only very faintly urged, that his finding would be conclusive on the point, it has been strongly insisted that a finding of the Judge, recorded by him in the proceedings upon the foreclosure petition, would, at the least, be *prima facie* evidence of the fact of service.

The general nature of the proceedings under the above Regulation was succinctly stated in a judgment of this Committee, in which it was pointed out that the functions of the Judge under section 8 are purely ministerial. (*Forbes vs. Ameeroonissa Begum*, 10 Moore's Ind. App., 350).

Their Lordships, considering that the duties of the Zillah Judge in the matter of a foreclosure are of a ministerial nature, considering the vast importance to mortgagors of the notification, and the consequences which follow if they do not redeem within the prescribed time, are of opinion that the service of it should be established by evidence in a suit like the present, which is brought, in fact, to enforce the foreclosure. The proceedings of the Judge are *ex-parte*, and even if the Judge examined the Nazir or person who served the notice, it would be unsatisfactory that the estate of the mortgagor should depend upon his opinion. The argument indeed was not pressed that it would be conclusive, but it would be going far to say that it is of such authority as to be *prima facie* evidence, which should shift the onus of proof upon such an important point, and relieve the mortgagee from giving affirmative proof of the due performance of a condition necessary to be established before the foreclosure can attach upon the estate.

In the present instance, however, the case shows that the Judge had no proof, properly so called, of the service. It is plain from the manner in which the entry of the service is made, that nothing more occurred than this, that the Nazir having received the perwannah, made a return, as it is called, on the back of it, stating what he had done with it. The substance, of the return is stated in the proceedings of the Judge. After recording that "Notices and copies of the petition for foreclosure of mortgage addressed to the opposite party, dated the 27th of February 1866 A.D., were delivered to the Nazir under a per-

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 AND OTHERS.

*Judgment,  
 Privy Council.*

wannah to serve on the opposite party," it goes on: "Thereupon the Nazir submitted a return on the back of the perwannah to the effect that he could not meet the opposite party, and that he had stuck up a copy of the notice and of the petition to the houses of each of the opposite party, along with two receipts in the Hindi character severally dated 13th and 14th Cheyt 1273, F.S., written by Bunsî Chowkidar and Bochâl Chamar 'Poneas,' inhabitants of Mouzah Khoksisyam, Pergunnah Nesingpore Koorâ, which were annexed on the record." Then it goes on: "To-day the record of the case was brought up, and on a reference to the return submitted by the Nazir it appeared that the notice had been duly served." Therefore we have, on the face of this document, what the Judge considered to be proof of the notice, namely, the return of the Nazir, which is a mere statement of that officer, without apparently any verification upon oath, or any examination of the Nazir by the Judge.

Upon the trial no proof whatever was given by the plaintiffs of the service of the notification. They appear to have relied on the recorded return of the Nazir. But it was contended that the want of proof is immaterial, in consequence of certain admissions contained in two petitions filed on the part of the mortgagors, the Dasses. One is a petition signed by five, and the other by six. They were originally 19 in number, and the remainder do not appear to have petitioned or to have made any admission. The first petition refers in this way, and in this way only, to the service: "The applicants caused a notice under Regulation XVII of 1806 to be issued on the 27th February 1866, clandestinely served without the knowledge and information of your petitioners. Now your petitioners having come to the knowledge of the case from some out-of-the-way sources, offer objections on the following grounds." This petition appears to have been presented a short time only before the end of the year of grace, and contains no admission of the time, or sufficiency of the service.

Their Lordships, therefore, consider that it does not amount to an admission that the notice had been properly served upon them at the time at which the mortgagee alleges it to have been, or that they had knowledge of it at a time which would have justified the foreclosure.

The other petition, no doubt, does contain an admission. There is this statement in it : "The petitioners have, under a deed of conditional sale, dated the 9th Aughan 1266 F.S., for Ra. 5,000, had notice under Regulation XVII of 1806, in respect of 5 annas 3 gundas 1 cowri 1 krant of Mouzah Dooram Mudehpore, Pergunnah Nesingpore Koora, Zillah Bhaugulpore, issued to us. Therefore, we beg to submit our objections." It is true they do not, in terms, admit the time at which they had notice, but with regard to those petitioners, a Judge would not be wrong in holding that there was an admission by them of due service. But this petition is the petition of six only out of the nineteen mortgagors.

The importance of requiring proof of the service of the notice, and not trusting to a bare statement that notice had been duly served, is enhanced by the consideration that it has been held by a decision of the Full Bench of the High Court of Bengal, that the year during which the mortgagor may redeem his property runs, not from the date of the perwannah or the issuing of it by the Judge, but from the time of service. (*Mohesh Chunder Sen vs. Mussamat Tarinee*, 10 W. R., 27 ; 1 B. L. R., 14 F. B.) This decision overruled some cases in the late Sudder Courts, in which it had been held that the year was to run from the date of the notification. Their Lordships are quite prepared to adopt the decision of the High Court. It is obvious that, if the year is to run from the date of the perwannah, the negligence of the Nazir, or other circumstances, may prevent its service for a considerable time after its date, and so the mortgagor would lose the benefit of a full time which it was intended by the Regulation to give him.

The necessity of proving service of the notice has recently been decided by two Courts in India—one a Division Court of the High Court of Bengal, and another a Division Court of the North-Western Provinces. In both it has been held that the service should be proved in the action which is brought to enforce the foreclosure. (*Syud Yusuf Ali Khan vs. Mussamat Azumtooissa*, W. R., 1864, p. 49.) The case in the North-Western Provinces is in the 3rd High Court Reports of that Province, p. 325.)

What their Lordships have held with regard to the service of the notice would be sufficient to dispose of the case against the appellants, but for the fact, to which allusion has already been

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—

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made, of the admission by some of the defendants that they had received the notice. This opens the question whether the foreclosure is complete as against all or any of the mortgagors. The High Court has held that the omission to serve any one of the mortgagors would be fatal to the validity of the foreclosure. Their Lordships think that, in the circumstances of this case, service upon those only of the mortgagors, whose petition admitted service, would be insufficient to warrant the foreclosure of the whole property or of any of it.

This is a mortgage for one entire sum, and the property, although held in certain shares, was mortgaged as a whole to the extent of five annas and a fraction, and was redeemable only upon payment of the entire sum. Each and every one of the mortgagors was interested in the payment of that money and the redemption of the estate, and each and every one of them had a right by payment of the money to redeem the estate, seeking his contribution from the others. The equity of redemption of those who were not summoned, and who had no notice that the mortgagee was demanding his money, cannot be foreclosed, because those who have been served have omitted to redeem. It is impossible for the mortgagee to obtain a foreclosure of the whole of the estate upon a service on some only of the mortgagors. Then, with respect to the mortgagors who have admitted notice, it is to be observed that it was not sought to foreclose the individual shares of each as against each, but to foreclose the whole estate, as upon one mortgage, one debt, and one entire right against all.

Further, the Mundurs, the defendants of the second class, purchased some share of some of the Dasses before the foreclosure proceedings took place. It appears that in February 1861, two or three years after the conditional sale, and before the notice of foreclosure, two gundas and two cowries was sold to the Mundurs. It is said that they did not take possession, but they had become by this purchase the owners of the equity of redemption of the purchased shares, and notice of foreclosure ought to have been served upon them. Mr. Doyne has argued that a purchaser who has not taken possession need not be served. Their Lordships, however, think that that argument cannot be sustained. The

mortgagee, when he seeks to foreclose, must discover and serve the persons who are the then owners of the estate.

A question of this sort came before this tribunal in the case of *Mohun Lall Sookool vs. Goluck Chunder Dutt*, 10 Moore's Ind.

App., 14. Their Lordships say upon it: "It is quite clear upon the authorities that, if the sale had taken place before the notice of foreclosure was filed, that notice, to be effectual, must have been served on the purchaser, and in the circumstances above stated their Lordships conceive that it ought to have been served upon the decree-holder. Yet there is no evidence of any attempt to serve it upon any one except the widow and heiress of the original mortgagor." There are subsequent cases in India which show that the view taken by their Lordships has been followed in practice.

Without saying that there may not be cases of mortgages of separate shares, in which, by proceedings properly framed, foreclosure may take place in respect of some of such shares only, their Lordships think the proceedings in this case are not such as will sustain the present action as against any of the defendants.

What their Lordships have said is enough to dispose of this case, but they think it right to advert to the main question which arose upon the merits, whether this conditional sale was intended between the parties to be really operative as a *bond fide* instrument.

It seems that Rajah Tek Narain was a patron of the family of the Dassas. They were involved in debt, and he probably advanced money to them from time to time. But, with regard to this particular instrument, there is strong evidence, arising from the history of the case and from facts which are beyond dispute, for presuming that it was not intended to be acted upon by Rajah Tek Narain. The deed is dated the 30th November 1858. In its terms it provides for immediate possession. A question, indeed, was raised whether that was so. It was said that the construction was at the least doubtful, and that it was not intended that the Rajah should have possession until the two years mentioned in the deed for the payment of the money had elapsed. However, this may be, possession was not taken. No provision is made in the deed for payment of interest, and none was demanded. The two years given by the deed for the

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payment of the money expired on the 30th November 1860. The petition to foreclose was not filed until the 2nd of January 1866, and up to this date it is plain that the Rajah had not entered into possession, had received no interest, nor apparently had asked for any. He obtained what is called the order of foreclosure on the 14th September 1867. The note of the Judge that the foreclosure was "sanctioned" cannot, indeed, be properly regarded in the light of an order. He takes certain proceedings, and makes a record of them, but he can give no judgment in any way binding on the parties. However, the proceedings in his Court were complete on the 24th September 1867. Again, no action is taken; possession is left where it was, no interest apparently is demanded, and this suit is not brought until the 1st of October 1872, nearly 14 years after the mortgage, and five years after the foreclosure proceedings came to an end.

Then the property is dealt with by the Rajah himself, in a manner which seems quite inconsistent with his having a deed of conditional sale which was intended to be acted upon. In 1861 a lease was granted by the Dasses to the Rajah (in the name of his servant Bijoz Dass) of six annas and certain fractions of annas of the same mouzah. Those annas must have included the whole of the shares which had been mortgaged—it appears to have included more; it is an ordinary lease, and part of the rent was to be deducted on account of a former Zurpeshgi. Again, in 1867, after the Rajah's death, his sons obtained decrees against the Dasses, and the right and interest of the Dasses in this estate were notified for sale under those decrees. It appears that just before the days when the sale was to take place, the Dasses sold their shares to the Mundurs, who alone appear here as respondents, obtained a large sum of money from them, and paid over that money in discharge of the judgment-debt. Those circumstances are not referred to to show that the conditional sale did not exist, but they are inconsistent with its existence as a document which was intended to be acted upon. Throughout the above transactions there is no trace that it was referred to, or that any notice was given of it, or that anybody knew anything of it. Again, the Rajah, after the conditional sale, as admitted in the plaint, purchased some of the shares of the Dasses which had

been mortgaged. They are sales as if the Dasses had the absolute ownership. The deeds in no way refer to the mortgage, nor was any provision made respecting the mortgage-debt.

It is not necessary for their Lordships to go further into these transactions. They have adverted to them because they were desirous of expressing the opinion they entertain of the extreme doubt, to say the least, which rests upon the *bona fides* of the conditional sale. They do not desire to impute fraud to either the Rajah or the Dasses. The Rajah had probably taken this deed from them to act upon it in case he should think it right, but did not think it right to do so; and having kept it for so long a time without acting upon it, there is strong evidence in this and in the other circumstances of the case which have been adverted to, leading to the conclusion that it is not a *bond fide* conveyance as against *bond fide* purchasers, which the defendants, the Mundurs, are.

On the whole case, therefore, their Lordships will humbly advise Her Majesty to affirm the judgment of the Court below, and to dismiss this appeal with costs.

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 —  
*Judgment,*  
*Privy Council.*  
 —

## [CIVIL APPELLATE JURISDICTION.]

1878  
January 7.

CHUNDER SIKHUR MOOKERJEA AND } PLAINTIFFS;  
 ANOTHER . . . . . }  
 AND  
 COLLECTOR OF MIDNAPORE . . . . . DEFENDANT.

*Specific Performance—Construction of Contract—Vagueness.*

Where, on the settlement of plaintiff's zemindari, Government stipulated to retain under its own control the construction of embankments and excavation of canals within the zemindari, and afterwards allowed a certain canal to silt up, and the drainage to be impeded, to the injury of plaintiff's land and crops: *Held*, that no suit based on the stipulation would lie against Government to compel the re-excavation and maintenance of the canal, because (1) the terms of the stipulation were too vague and general; and (2) the course last pursued by the Government may have been, on the whole, the best for carrying out the purpose for which the stipulation was made, namely, the comfort and health of the population.

Even before the Specific Relief Act was passed, the policy of the law was against the enforcement of specific performance of contracts of this nature.

**R**EGULAR APPEAL from a decree of the Subordinate Judge of Midnapore.

From before the permanent settlement down to the year 1863, the Protabhkhal khal was used and maintained for the passage of salt boats by the Government. In that year the Government abandoned the khal and allowed it to silt up. A part of the plaintiff's zemindari, which was drained by this khal, became (so it was stated) liable to floods in consequence of the khal not being kept open; and the present suit was brought to compel the Government to re-excavate the khal. Plaintiff relied on the following passage in the deed of settlement made by the Government with the zemindar in 1795: "The construction of Bheries (small embankments), the excavation of the silt of khals, the closing the mouths of khals, the construction of Gangura (large embankments), &c., in connection with the salt and sweet (i.e., not saline)

lands of the said purgana shall be made by the Government of the Honourable Company."

The Subordinate Judge, quoting the preceding passage from the kabuliat, thus proceeds: "I have given due consideration to this clause, but I fail to see how the plaintiff can insist on the Government's maintaining and excavating, at its own expense, a khal which was not specially mentioned in the kabuliat, and which was hitherto chiefly maintained by Government, not for the special benefit of the zemindars, but for their own purposes; the terms of the kabuliat are too general and do not indicate that this or any particular khal is to be maintained by Government at its expense. Government, as the paramount power, responsible for the life and property of its subjects, can at any time determine whether the construction of any khals or embankments is conducive to their interests; and I believe it is this general power which is retained by Government under the terms of the kabuliat. I do not think that under these terms every embankment or khal for the drainage of this zemindari must be constructed or maintained by the Government. It was, no doubt, intended that Government will determine which khal to maintain, on consideration of the existing state of the country, and all the circumstances that might be brought to its notice; and if the Government chose, on consideration of all matters and the then state of the country, not to maintain this khal, I do not think it can now be compelled by a Court of Justice to re-excavate it merely because it has now turned out that it would be more beneficial to the zemindari and its subjects if it were not closed. To my mind it appears that with the determination of the Government, who acted on the advice and opinion of its responsible officers with regard to this khal, the Court ought not to interfere. The Court should only see whether there has been an agreement between the plaintiff and defendant binding the latter to maintain this khal and excavate it, and I do not see any such agreement. The general terms relied upon by the plaintiffs, do not, I think, give them any right to compel Government to re-excavate the khal which was hitherto maintained by it only for its own purposes. The evidence of the plaintiff's witnesses, which remains un rebutted,

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proves, it is true, that since the bed of the khal has silted up the ryots have suffered much, both in their health and property. If that be the fact, which I dare say it is, the plaintiff ought to move Government through the proper channel to make necessary arrangements for the drainage of the surplus water of the zemin-dari, and the application, if made, must receive due and proper consideration at its hands; but the present suit to compel Government to excavate this khal in the absence of any agreement must fail." Plaintiff appealed.

Baboo *Gopal Lall Mitter*, for the Appellant, argued that on the terms of the kabuliat the Collector was bound to excavate the khal and to restore the drainage of the neighbouring lands.

JACKSON, J., drew attention to the nature of the suit brought, and quoted section 21 of the Specific Relief Act (Act I of 1877) which, though not then law, did not go so far as the law administered in the Courts before its enactment.

Baboo *Annoda Prôshad Banerjee* (Senior Government Pleader), for the Respondent, was not called upon.

The judgment of the High Court (1) was delivered by

JACKSON, J. JACKSON, J. :—

We do not think it necessary to call upon the Government Vakeel in this case, because we are of opinion that the judgment of the Court below is substantially correct. The terms of the kabuliat, which were recited to us, and which it may be admitted are binding on the Government as well as the zemindar, are extremely vague, and it would be dangerous to impose upon the Government, on the strength of such terms, so extremely onerous an obligation as the plaintiffs seek to impose in the present case. But, in addition to that there is on principle no obligation requiring the Government, or any person whom it is sought to bind by such words, not to do that which may, upon a proper consideration of the whole subject, carry out the purpose obviously intended, but to do a particular thing because that particular thing was once done in view of that same object. The Government, no doubt, undertook in this agreement between it and the

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zemindar to retain in its own hands the construction of certain khals and other things, and partly in consideration of that agreement, and partly in consideration of its duty as paramount power, the Government would, no doubt, be desirous of taking all steps that might be necessary for that object, with a view to the comfort and health of the population. But it is a very different thing to seek to compel Government, by a plaint filed in Court, to maintain a particular khal in a certain position; nor has the Court before it, as it seems to us, any materials upon which it could make any specific order such as it would have to make in order to be of use to the plaintiffs, because the Court has no means of ascertaining at what depth and width it would be necessary to maintain this khal for the purpose of effectual drainage of the plaintiff's estate. These are general observations which appear to us necessary to be made, but it also seems to us that the policy of the law, even before the Specific Relief Act was against the enforcement of specific performance of contracts of this nature. It is not necessary for us to say what relief, if any, the plaintiffs would be entitled to under the circumstances. We think it quite clear that they could not succeed in the present suit; and that the suit was properly dismissed by the Court below. The appeal is dismissed with costs.

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SIKHUR  
MOOKERJEE  
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OF  
MIDNAPORE.  
*Judgment.*  
JACKSON, J.

## [CIVIL APPELLATE JURISDICTION.]

1878  
January 9.

SREEMUTTY ZULFUND BEEBEE . . . . DEFENDANT;  
AND  
RADHICA PROSONNO CHUNDER . . . . PLAINTIFF.

*Right of Occupancy independent of landlord's title.*

A ryot who occupies land for a period of twelve years acquires therein a right of occupancy, whether the person under whom he holds has any title to the land or not.

*Syed Ameer Hossain v. Shao Sahai*, 19 W. R., 338, cited and followed.

**SPECIAL APPEAL** from a decree passed by the Judge of Midnapore, reversing that of the Moonsiff of Nimal.

This was a suit for ejectment and *khas* possession. The land in dispute, with other land, had been purchased by the plaintiff at an auction sale for arrears of revenue in 1871. Adjoining the plaintiff's estate is an estate called Mouzah Raipur, in which the defendant holds a jote. She claimed the disputed land as part of her jote, and that it belonged to the Raipur estate; also, that she had held it for eighteen years, paying rent to the proprietor of the Raipur estate. It was found that the land belonged to the plaintiff's estate, but that the defendant had occupied it for eighteen years as part of the jote for which she paid rent to the proprietor of the Raipur estate.

The Court of First Instance held that the defendant had acquired a right of occupancy, and that the plaintiff was entitled to be put in proprietary possession only. The plaintiff appealed, and this decree was reversed; defendant then brought a special appeal.

Mr. R. E. Twidale and Moonshee Mahomed Yusuf, for Appellant.

Baboo Bhowany Churn Dutt, for Respondent.

The judgment of the Court (1) was delivered by

JACKSON, J. :—

The plaintiff brought this suit to recover possession of 205 beegahs of what he calls *julpai khas putit* lands by establishing his title as auction-purchaser. It is stated in the plaint that the lands, the subject of suit, were *julpai* lands of certain mouzahs which had been given up by the Salt Agent, and, on the abolition of the Salt Agency, the Collector had settled all the *julpai* lands with the zemindars; that default of payment of the arrears due being made, the *julpai* mehal was brought to sale and purchased by the plaintiff; that the defendant was an occupant of the land in question without any title, and would not allow the plaintiff to take possession.

The defendant, 'no doubt, mistaking what was the proper line of defence, appears to have contested the plaintiff's right, and to have sought to prove that the lands in question were not part of the *julpai* lands, but were *mudur* lands of Mouzah Raipur; and she alleged that the lands in dispute having been let in farm to one Rutnabur Pahari, he had let them in jote to one Jonab Ali, who afterwards sold his tenure to the defendant; and it was suggested that the plaintiff's suit had been brought with the improper intention of annexing the lands to his own estate.

The Moonsiff, who tried the suit, found distinctly upon the evidence that the lands in dispute were parts of the *julpai* lands as mentioned by the plaintiff, and that they were not *mudur* lands as pleaded by the defendant. He then went on and found that "the defendant and her vendor, Jonab Ali, long held possession of the disputed lands by cutting jungle, constructing *kherry* bunds, and bringing them under cultivation at heavy expense, and that defendant has been in possession for about 17 or 18 years, and that Jonab Ali was in possession during the Salt Agent's time." On these grounds he thought that the plaintiff was entitled to such possession as is exercised by a superior landlord, but that the defendant, being a jotedar, was entitled to remain in occupancy.

Against the latter part of the judgment the plaintiff appealed to the District Court, and the effect of the District Judge's

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SHENKUTTY

ZULFON

RAJENDRA

v.

RADHICA

PROSODHO

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judgment was this,—that although the defendant might have held this land and paid the rent for twelve years and more, yet that, as she was not paying to the plaintiff, but held the land as a portion of a different estate, the right of occupancy which the Rent Law recognizes and affirms could not grow up under such circumstances. He says: “The defendant’s jote is in the *mudur* land, and her encroachment on *julpai* land, over which neither she nor her vendor had any right, cannot give her a right of occupancy. She was simply a trespasser.” He goes on: “The finding of the lower Court that the land is part of the *julpai* estate is tantamount to a finding that the defendant is only a trespasser. The respondent’s pleader argues that, as she was acknowledged as a tenant by her lessor, she cannot be treated as a trespasser and ejected; but the party whose tenant she is has no right in the *julpai* lands, and he could not confer on her a right which he did not himself possess.” It is clear from that that the defendant had not ousted any person who was a rightful jotedar or tenant, or any body else, but that she had taken a lease of these lands from a person claiming to have a right, and, as such lessee, had occupied and presumably paid the rents. Now, that a person occupying land under one who is not the rightful landlord does, nevertheless, acquire a right of occupancy, is most clearly laid down by Mr. Justice PHEAR and Mr. Justice AINSLIE in a case printed in 19 W. R., 338—*Syud Ameen Hossein vs. Sheo Sahai*. That was, apparently, a case in direct analogy with the present. In a suit between the zemindars of one estate and the proprietors of another, it had been fairly proved and determined that the land, the subject of the suit, belonged to the plaintiffs; and upon their contending, in the suit which was then before the Court, that even if the defendants had cultivated for twelve years under the maliks, they could acquire no right of occupancy inasmuch as the maliks had no title, the learned Judges held: “The mere fact that the person to whom he for some years paid rent had no title cannot take away from him the character of ryot or protect him from counting those years in the time necessary to give him a right of occupancy under Act X of 1859.” In that decision, as at present advised, we entirely concur. The Judge, it appears to us, states a fallacy

when he speaks of a lessor conferring on the ryot a right which he does not himself possess. That is not a right conferred by any lessor; it is a right which, by virtue of the law, grows up in the ryot from the mere circumstance of cultivating land for twelve years or upwards, and paying rent due thereupon. It appears to us, therefore, that the lower Appellate Court is mistaken; and the judgment of the Judge must, therefore, be set aside, and that of the Court of First Instance restored with costs.

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SHEEMUTTY  
ZULFUN  
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v.  
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PROSONNO  
CHUNDER.  
Judgment.  
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## [CIVIL APPELLATE JURISDICTION.]

1878  
January 10.

BABOOJAN CHOWDHRY. . . . . PLAINTIFF;  
AND  
JASODHUR MISSER . . . . . DEFENDANT.

*Practice—Evidence—Pottah—Act VIII (B.C.) of 1869, sections 3, 4.*

In a suit for enhancement of a jote, which defendant had held for more than twenty years at a fixed rent, plaintiff put in evidence a pottah dated in 1795, to show that the rent of the jote had been settled subsequently to the time of the Permanent Settlement: *Held*, that the proper way of dealing with such an instrument was to try (1) whether it was genuine; (2) whether it referred to the jote in dispute; and (3) whether the rent was fixed by it on the date which it bore.

**S**PECIAL APPEAL from a decree passed by the District Judge of Purneah, affirming a decree of the Sudder Moonsiff of that District.

This was a suit for enhancement of rent pursuant to notice. It was proved that the rate and the actual rent had not been changed for a period which brought the defendant well within the protection of section 4, Act VIII (B.C.) of 1869. To meet the presumption thus arising, plaintiff put in a pottah dated the 28th of November 1795; and the question in Special Appeal was whether the course of proceeding adopted by the District Judge in reference to this pottah was correct—the Sudder Moonsiff having held that it did not refer to the land in question.

Mr. R. E. Twidale and Moonshee Mahomed Yusuf, for Appellant.

Baboo Chunder Madhub Ghose, for Respondent.

The judgment of the Court (1) is as follows:—

In this case the defendant proved that he had held the land for over twenty years at an unchanged rent, and he claimed the benefit of the presumption which by law arises under such circumstances. This was met by the plaintiff producing a pottah of

(1) JACKSON and KENNEDY, J.J.

the year 1202 (1795) granted to Tota or Heera Misser—it is not clear which the name was—which was said to have been the origin of the tenure now held by the plaintiff. The Judge deals with that pottah in this way. Alluding to the contention that the pottah did not refer to the land now in question, he gives reasons which incline him to believe that it did so refer. He goes on to say: “Even granting this,” that is to say, on the supposition that the pottah did relate to the land in question, “the pottah, when I come to analyze it, in no way proves that the rates were changed in a way to take away the privilege granted by section 3 of Act VIII of 1869 (B.C.) It is very indefinite; it seems to say that there has been a new measurement of seven pre-existing jotes, and it gives an increase to each. Some rates are mentioned in the document, but as far as I can see those are the pre-existing rates, and therefore when the burden of proof is (as it now is) on the plaintiff, he cannot be held to have proved that the rates of the jotes under review were in any way touched by this document. I think, therefore, that the Moonsiff is right, and that the defendant, *quoad* this jote, is protected from enhancement.” The Judge in so deciding appears to have lost sight of the precise terms of section 4 of the Act. It says that when a ryot proves what has been proved in the present case, “it shall be presumed that the land has been held at that rent from the time of the Permanent Settlement, unless the contrary be shown, or unless it be proved that such rent was fixed at some later period.” The plaintiff’s object in producing this pottah apparently was to show that the rent of the holding had been fixed at the time when the pottah was granted, that is to say, in the year 1202, or posterior to the Permanent Settlement. It was therefore essential that the Judge should find,—first, that the pottah was a genuine instrument; secondly, that it did, in fact, refer to the holding now in the defendant’s occupancy; and thirdly, that by such pottah the rent was fixed at the date which it bore. If these facts are made out to the satisfaction of the Judge, then it would seem that the plaintiff will have proved that the rent was fixed at a time subsequent to the Permanent Settlement, and the presumption would be rebutted. The case must go back to the lower Appellate Court in order that these points may be tried and determined.

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 BABOONJAN  
 CHOWDHRY  
 v.  
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 MISSEK.  
 —  
*Judgment.*  
 —



## [CIVIL APPELLATE JURISDICTION.]

1878  
January 10.

OBHOY CHURN MOHAPATTUR AND } PLAINTIFFS;  
 ANOTHER . . . . . }  
 AND  
 KANYE RAWUT . . . . . DEFENDANT.

*Right of Occupancy—Nij-jote—Act VIII (B. C.) of 1869, section 6—Act X of 1859, section 6.*

The *nij-jote* land referred to in Act VIII (B.C.) of 1869, section 6, as land in which a right of occupancy cannot be acquired, is land which is the *nij-jote* of the zemindar, and not that which is merely the *nij-jote* of a sarbarakar holding under the zemindar.

**S**PECIAL APPEAL from a decree passed by the Officiating Judge of Cuttack, affirming that of the Moonsiff of Balasore.

The land in dispute in this case was a portion of a mousah held in sarbarakar tenure, and was the *nij-jote* of the sarbarakar. On the 22nd of November 1853, the then sarbarakar granted a pottah of the land to the defendant. There was no limitation of time in the pottah. The zemindar sold the sarbarakar tenure for arrears of rent on the 28th of April 1876, and the plaintiffs became the purchasers. The defendant afterwards paid rent to the plaintiffs and continued to be their tenant down to the bringing of this suit.

The plaintiffs brought a suit for possession, denying that the defendant was their tenant, and stating that he took forcible possession of the land on the 5th of January 1875. These allegations were proved to be false. The plaintiffs also contended that their purchase of the sarbarakar tenure at the sale for arrears of rent in 1866 gave them a right to eject the defendant, unless he could show a right of occupancy: and that this he could not do, as the land held by him under his pottah was admittedly the *nij-jote* of the sarbarakar. The suit was dismissed in both the lower Courts, and plaintiffs appealed.

*Baboo Umakali Mookerjee*, for Appellants.

*Baboo Obhoy Churn Bose*, for Respondent.

The judgment of the High Court (1) is as follows :—

Two objections have been urged against the judgment of the lower Appellate Court in this case. One is, that the defendant could not be entitled to hold this land as an occupancy ryot, inasmuch as it came within the description of *nij-jote* in section 6, Act VIII (B. C.) of 1869, and the corresponding section of Act X of 1859. As to this objection, it appears to us that the pleader for the appellant is entirely under a mistake. The land is not spoken of as *nij-jote* of the zemindar, but as *nij-jote* of the sarbarakar. Judging from the judgment of the lower Appellate Court, even if the parties had section 6 of Act X in their view, it does not appear that the circumstances are such as that that section is applicable. The sarbarakar is not the zemindar; he is a person who holds lands and has certain duties under the zemindar. There is nothing, therefore, to show that rights of occupancy may not very well grow up, notwithstanding this section, as regards the land held by the sarbarakar. But in point of fact it is quite superfluous to consider this, because the Judge, in an earlier part of his judgment, points out that the defendant was in possession; that his tenancy had never terminated; and that plaintiffs came into Court on a false cause of action. It is a pity that the Judge after such a finding did not put plaintiffs out of Court on that ground. But it is further objected against the finding on which that part of the judgment is based, that the Judge had made a mistake as to a portion of the evidence. The appellant's vakeel evidently refers to the copies of decrees for rent which the plaintiffs had filed, and which, the Judge observes, were no evidence against the present defendant who was no party to them. We think the Judge is quite right. The defendant could not certainly be bound by them. Unfortunately, however, the Judge goes to say: "The plaintiff should have examined the ryots against whom the decrees were obtained, and questioned them as to the decrees;" and it is complained that one of the ryots against whom these decrees were obtained has been examined. But the sentence which I have just

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(1) JACKSON and KENNEDY, J.J.

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*Judgment.*

read is superfluous. The Judge, when he said that those decrees were not binding on the defendant, had said enough. We think, therefore, that there is no valid ground of special appeal; that the judgment of the Judge, which affirms that of the Court of First Instance, cannot be impeached; and that this special appeal must be dismissed with costs.

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## [CIVIL APPELLATE JURISDICTION.]

SIB CHURN SEN . . . . . PLAINTIFF ;

1878  
January 10.

AND

JONARDHON DEY AND OTHERS . . . . . DEFENDANTS.

*Practice—Issues—Transferable Tenure—Intermediate Holding—Act VIII  
(B.C.) of 1869, section 26.*

In determining whether a tenure is a permanent transferable interest within the meaning of section 26, Act VIII (B.C.) of 1869, the issues should be so framed as to raise distinctly the question whether the tenure was an intermediate one between the landlord and the ryot.

**SPECIAL APPEAL** from a decree passed by the Judge of West Burdwan, reversing that of the Moonsiff of Bancoorah.

This was a suit to compel the registration of the plaintiff's name in the *serishta* of the defendant, as proprietor of a *mokurari* tenure which he purchased from the former proprietor by *kobala* dated the 8th of July 1872. The defendant contended that neither the plaintiff nor his vendor had any intermediate or permanent transferable interest, and that he was not bound to register the plaintiff's name in his *serishta*. Plaintiff added his vendors as *pro forma* defendants.

The Court of First Instance tried—(1) whether plaintiff's vendors had such a transferable interest in the *jumma* in question as is contemplated by section 26, Act VIII (B.C.) of 1869; and (2) whether the plaintiff was entitled to have his name properly registered. These two issues having been found in favour of the plaintiff, he got a decree, which was reversed on appeal, on the ground that the tenure was not one intermediate between the *zemindar* and the cultivator. Plaintiff then brought this Special Appeal.

Baboo *Bungsee Dhur Sen*, for Appellant.

Baboo *Golap Chunder Sircar*, for Respondent.

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v.  
JONARDHON  
DRY AND  
OTHERS.

Judgment.

The judgment of the Court(1) is as follows :—

The plaintiff in this case having sued for registration under section 26 of the Rent Act, the defendant, in the first place, denied that the plaintiff had acquired any interest at all, because he denied the right of the persons from whom the plaintiff is said to have purchased ; in the next place, he denied that the tenure was such as that the plaintiff was entitled to registration. Upon that, the Moonsiff framed three issues : firstly, as to the interest of the *pro formâ* defendants ; secondly, whether plaintiff's purchase was merely colourable or *bonâ fide* ; and, thirdly, whether the plaintiff is entitled to have his name properly registered. As to this third issue all that the Moonsiff found was that the interest which the plaintiff had undoubtedly purchased, had been decided in a previous litigation to be of a permanent transferable character, and he gave the plaintiff a decree. On appeal the Judge pointed out that under section 26, which entitled the plaintiff to registration, it was necessary that the tenure should be of a kind intermediate between the zemindar and the cultivator, and he thought that the tenure in dispute was not proved to have that character, but, on the contrary, he considered that the evidence was the other way. Finding this, he declined to enter into the question whether the interest was "permanent and transferable." The Judge's reasoning, we think, is not very clear, and we are inclined to think that he mistook the effect of the decision to which he refers. However that may be, it is clear that the question, which was undoubtedly a material one, was not properly raised in the issues framed by the Court of First Instance. The plaintiff ought to be required to prove, and perhaps he would have very little difficulty in proving, that the tenure which he acquired was intermediate between the landlord and the ryots. The case must go back to the lower Court in order that this issue may be raised and the parties allowed to offer evidence.

When that point is determined, the Court below will have no difficulty in deciding whether the tenure is such as is described in section 26, Act VIII of 1869.

(1) JACKSON and KENNEDY, J.J.

## [CIVIL APPELLATE JURISDICTION.]

KALLY PROSAD ROY . . . . . PLAINTIFF;  
 AND  
 SYUD SARFERAZ ALLI AND ANOTHER . . DEFENDANTS.

1878  
 January 10.

*Co-sharers—Agreement to receive Allowance—Mortgage of Shares.*

Where a Mahomedan widow, her two minor sons, and six relatives were entitled by inheritance to certain property originally belonging to a paternal ancestor of the sons, and the six relatives received instead of their shares a commuted allowance: *Held*, that the holder of a money decree on a mortgage bond in which the widow and the six relatives had jointly pledged their interest in the property for the payment of money, could, as against the sons, sell the seven shares in execution of his decree; it not appearing that the agreement to accept the commuted allowance was irrevocable, or that that agreement had not been entered into with the widow alone.

**S**PECIAL APPEAL from a decree passed by the Judge of Beerbhoom, reversing that of the Subordinate Judge of that District.

In this case the first two defendants were the sons of a Mahomedan widow who managed the property in dispute during their minority. The remaining six defendants had by inheritance shares in the property, but they received instead a fixed allowance which used to be paid to them by the widow, the mother of the first two defendants. On the 22nd of February 1870, the widow and the last six defendants gave a joint bond to the plaintiff in which they pledged their interest in the property for the payment of a sum of money. Plaintiff got a decree on this bond on the 20th of February 1874, and in execution of that decree attached the shares of the widow and the last six defendants. The first two defendants (now of age) intervened, claiming that their father and they had held possession of the property for more than twelve years adversely to the last six defendants, who had therefore no right to share in the property; that the share of the widow, their mother, was only one-eighth; and that the

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 ———  
*Statement.*

remaining seven-eighths belonged to them. An order was passed directing the sale of the one-eighth belonging to the widow, and also the sale of the rights of the six other defendants to the pensions to which they were found entitled.

Plaintiff then brought this suit to have it declared that the rights of the last six defendants in the property were rights to shares, and that these shares were liable to attachment and sale in execution of the decree of the 20th of February 1874. It was admitted that *prima facie* they were entitled by inheritance to specific shares, and the main dispute was as to the nature of the commutation allowance. Was it money paid by the widow as *gudee nisheen*, i.e., as manager of the property, for the last six defendants, or was it paid in consideration of their having released all their right to share in the property? And if it were paid in consideration of their having released their right, to whom was the release made? The plaintiff contended that the widow was merely *gudee nihseen*; the first two defendants contended for the finding of the Court in the execution case, namely, that the last six defendants were only entitled to pensions. The onus was, of course, on the defendants.

The Court of First Instance gave plaintiff a decree, which was reversed by the lower Appellate Court. Plaintiff appealed.

Baboo Mohiny Mohun Roy and Baboo Sharoda Prosono Roy, for Appellant.

Baboo Srinath Doss and Baboo Hury Mohun Chuckerbutty, for the Respondents.

The judgment of the Court (1) was delivered by

JACKSON, J. JACKSON, J. :—

It appears to me, on a consideration of this case, that the Judge has mistaken the nature of the facts and the legal consequences of what took place. In the first place, I think, the Court of First Instance was right in holding that under the circumstances there was no adverse possession as against these judgment-debtors, but that by receipt of the commuted allowance they maintained

(1) JACKSON and KENNEDY, J.J.

their right in the property. They were not in actual possession, so far as management and division of the property were concerned; but they were receiving what they regarded as the equivalent of their share, and, certainly, *non constat* that they might not have revoked that arrangement and resumed their rights as shareholders. I do not say positively that they could do so, but only that I see no reason at present to suppose that they could not. But setting that aside, even if the possession of the judgment-debtors is merely that of persons receiving fixed allowances out of the property, it appears that the party who had possession of the *corpus* of the property joined with them in the mortgage of the property, and between them they were able to pledge the whole. That was a matter clearly raised in the plaint; and the Judge ought to have adverted to it. I think, therefore, that the plaintiff had good reason for contending that the right, title, and interest of all his judgment-debtors in this property ought to have been put up to sale. The judgment of the lower Appellate Court, therefore, must be reversed, and that of the Court of First Instance restored, with costs.

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 KALLY  
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 ANOTHER.  
 ———  
*Judgment.*  
 ———  
 JACKSON, J.





## [CIVIL APPELLATE JURISDICTION.]

1878  
January 11.

IN THE MATTER OF MUSSAMUT JÂN KOER. . PETITIONER.

*Act X of 1877, Code of Civil Procedure—Ex-parte decree—Application for re-hearing refused—No appeal.*

An application under section 119, Act VIII of 1859, for the re-hearing of a case decreed *ex-parte* was rejected. Under that law this order was appealable. No appeal was, however, filed until October 1st, 1877, on which date Act X of 1877 came in force: *Held*, that the appeal is inadmissible, or there is no provision in Act X of 1877 for such an appeal.

**SPECIAL APPEAL** from the order of the District Judge of Gya, dismissing the appeal as inadmissible.

The facts of this case are set forth in the following judgment of the District Judge:—

It appears that the *ex-parte* judgment against appellant was passed on January 31st, 1877; and the order rejecting appellant's prayer for revival of suit was passed on September 22nd, 1877. The appeal against this latter order was filed on October 1st, 1877, after the new Code of Civil Procedure came into force. According to that Code there is no appeal against an order rejecting petition for revival, but there is an appeal against *ex-parte* judgments. Under section 3 of the new Code, appeals presented on or after October 1st, 1877, are subject to the new Code, and this appeal is therefore inadmissible. I therefore order that it be struck off. Appellant to pay respondent's costs with interest at 6 per cent.

Baboo *Bhawani Charan Datta*, for Petitioner.

As the order under appeal to the District Judge was not passed under the new Code of Civil Procedure (Act X of 1877), the right of appeal is not affected by section 588. The effect of section 3 has been wrongly interpreted by the Judge. If the appeal was under the new Code, it was admissible, because under the definition of "decree" (section 2) the order under appeal was a decree.

The judgment of the High Court (1) was delivered by

1878

AINSLIE, J. :—

The appeal having been tendered on the 1st October 1877, it came under the new Code of Civil Procedure. There is no provision in that Code for such an appeal as the petitioner wishes to prefer. The application must be rejected.

IN THE  
MATTER OF  
MUSSAMUT  
JAN KOER,  
*Petitioner.*

*Judgment.*

AINSLIE, J.

(1) AINSLIE and McDONELL, J.J.

## [CIVIL APPELLATE JURISDICTION.]

1878  
January 11. POROMSHOOK CHUNDER AND ANOTHER . . DEFENDANTS;  
AND  
PARBUTTY DASSEE . . . . . PLAINTIFF.

*Declaratory Suit—Confirmation of Title—Objection first raised in Special Appeal.*

Under the law in force before the Specific Relief Act (Act I of 1877) was passed, a suit by a plaintiff in possession for a mere declaration of title would not lie. (1) Thus, where A, the occupier of land alleged to be lakheraj, was sued for rent in the Small Cause Court, and a decree was given against her : *Held*, that a subsequent suit by A, for a declaration of her right to hold the land as lakheraj, would not lie.

*Padayalingam Pillay vs Shanmugham Pillay and others*, 2 Mad. 333, approved.

The High Court is bound, in special appeal, to consider an objection which raises the question whether a plaintiff is entitled to maintain the suit, and to obtain the decree which he asks for; even though such objection has not been taken in the memorandum.

**S**PECIAL APPEAL from a decree of the Additional Subordinate Judge of East Burdwan, reversing that of the Moonsiff of Cutwa.

Baboo *Mohini Mohun Roy*, for Appellants.

Baboo *Srinath Dass* and Baboo *Hem Chunder Banerjee*, for Respondent.

The facts of the case are sufficiently set forth in the judgment of Mr. Justice JACKSON.

The following judgments were delivered by the Court : (2)

JACKSON, J. JACKSON, J. :—

It appears to me that the objection taken during the argument of this special appeal, although it was not taken in the memorandum.

(1) NOTE.—Section 42 of this Act enlarges the powers of the Courts to make declaratory decrees, and Illustration (g), which is to the following effect, seems to be in point :—

A is in possession of certain property. B, alleging that he is the owner of the property, requires A to deliver it to him. A may obtain a declaration of his right to hold the property.

(2) JACKSON and KENNEDY, J.J.

dum of appeal, is a valid objection to the decision of the lower Appellate Court. The facts are shortly these: The defendants brought a suit in the Moonsiff's Court against the plaintiff to recover rent on certain lands in the plaintiff's occupation, and the amount sued for being less than Rs. 50, and the land being situated within the limits of the Cutwa Municipality, the Moonsiff tried the suit in his jurisdiction of Small Cause Court Judge with which he was vested by Government, and, on May 28th, 1875, gave judgment for the plaintiffs in that suit, who are now the defendants.

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 Judgment.  
 JACKSON, J.

The plaintiff brought the present suit, alleging herself to be in possession of all the moveable and immoveable properties of her husband as heir under a will executed by him, and setting out that the land in question was purchased by her husband in lakheraj right, setting out the suit which I have just mentioned as brought in what she calls the Petty Court, and alleging the land to be appertaining to a certain jumma, she concluded in these words:—"There being no appeal against the said decision, no measures have been taken, consequently the lakheraj right in respect to the lakheraj land mentioned in the schedule has been injured; and therefore I have brought this suit for establishment of lakheraj right to the lakheraj land, and laid the claim at Rs. 94, the price thereof."

It appears that the defendants, amongst other things, raised an objection to the frame of the suit, although it may be that the particular question before us was not discussed in the Court of First Instance.

The Moonsiff, who was the same Moonsiff who had tried the first suit, threw out this objection of the defendants; but upon the merits he found against the plaintiff, and dismissed the suit. The plaintiff appealed, and the appeal was heard by the second Subordinate Judge of East Burdwan, who reversed the judgment of the Court below and gave the plaintiff a decree.

The defendants appeal specially to this Court, and of course we are not only entitled, but bound, to consider an objection which raises the question whether the plaintiff was entitled to maintain the suit and to obtain the decree which he asked for. It has been constantly ruled in this Court, and in the other High Courts, and

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the law is stated in the case noticed by Mr. Broughton, in his edition of Act VIII of 1859, from 2 Mad., 333—*Padayalingam Pillay vs. Shanmugham Pillay and others*, that a suit ought not to be maintained where the plaintiff, who merely seeks for a declaration of title, is in possession. In the present case, the plaintiff was and is in possession of the land to which she says she is entitled. But she says, "inasmuch as the defendants claim to be entitled to take rent from me in respect of these lands, and inasmuch as I claim to hold the land lakheraj—free from payment of any rent; by that claim of the defendants, and by the fact that under such a claim they recovered a decree against me in the Small Cause Court, a cloud has been thrown on my title;" and she alleges that as a justification for this suit. There are, no doubt, cases (I am speaking now of the state of the law before the Specific Relief Act, Act I of 1877, was passed) in which a plaintiff has been allowed to say: "The defendant set up a title (a mortgage or any other title) embodied in a certain document. I have accordingly brought the document into Court, and I call upon the Court to look into that document (the alleged mortgage or whatever it might be) and to determine whether that is a valid mortgage." And if the Court held that the mortgage was not valid, then the mere invalidation of the document relied upon by the defendant has been considered such relief as the plaintiff might properly ask for. In the present instance the claim which the defendants have set up is no longer in the condition of a mere assertion or a claim for right. It has passed into a decree. Consequently the plaintiff could not bring this suit for the purpose of setting aside the judgment of the Small Cause Court, and therefore no relief could be had in respect of that. It appears to me, therefore, that under the law as it stood before the Specific Relief Act was passed, the plaintiff could not maintain the present suit. It was suggested that, in such circumstances, unless such a suit as the present is allowed to be maintained, the plaintiff will be without a remedy. That, in the first place, is not a reason for allowing a suit to be maintained which the law does not allow. But, in the next place, it does not seem that the plaintiff is without a remedy, for it is quite conceivable that if a further suit for rent be brought, she might immediately file a

suit in the Moonsiff's Court, and apply for an injunction to prevent the other party from proceeding, so long as her own suit is not disposed of and no absolute relief given her. It may also be, although I do not wish to express any positive opinion on the point, that the plaintiff before us may, if a fresh suit for rent be brought, again raise the same question, because the Small Cause Court has no power to determine finally a question of right; but it is unnecessary to decide that point. All I say is, that the present suit is not maintainable. I have the satisfaction of seeing that in addition to this ground there were other good grounds of defence which the defendants had in the present suit, and which the Moonsiff found in their favour; so that if possibly the suit might come before us for trial on the merits, we might be inclined to reverse the judgment of the lower Appellate Court on other grounds. In this appeal, therefore, the decree of the lower Appellate Court will be reversed, and the decree of the Court of First Instance dismissing the suit will be restored with costs.

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 —  
*Judgment.*  
 —  
 JACKSON, J.

KENNEDY, J. :—

KENNEDY, J.

I entirely concur. As a rule, this Court will not permit grounds of appeal to be taken in argument which have not been taken in the memorandum; but where a decree comes before it, which upon its very face is illegal, a decree which goes beyond the power of the Court which passed it. Under circumstances of this sort, I take it that this Court is bound to take up the point itself and rectify the mistake, and not allow itself to become an instrument for the commission of further mistakes.

## [CIVIL APPELLATE JURISDICTION.]

1878  
January 11.

ANNODA PROSHAD RAI . . . . . DECREE-HOLDER;  
AND  
SHEIKH KURPAN ALI . . . . . JUDGMENT-DEBTOR.

*Limitation—Execution—Act IX of 1871, Sch. II, Art. 167.*

Act IX of 1871, Sch. II, Art. 167, allows three years from the date of a previous application for execution, whether that previous application has been *bond fide* or merely colourable, provided it was made whilst the decree was in force. A Judge is not, therefore, competent to go into the question whether a previous application is colourable or not; but he is competent to decide whether or not any decree was alive at the time such previous application was made.

*Eshan Chunder Bose vs. Prannath Roy*, 22 W. R., 512; 14 B. L. R., 143; *Rohinee Nundun Mitter vs. Bhugwan Chunder Roy*, 22 W. R., 154, explained.

*Bemul Dass vs. Ikbal Narain*, 25 W. R., 249; and *Bisseshur Mullick vs. Mahatab Chunder*, 10 W. R., 9 F. B., cited.

**S**PECIAL APPEAL from an order passed by the District Judge of Tipperah, reversing that of the Moonsiff of Brahmanbaria.

This was an application for execution of a decree. An application for execution of the same decree was made on the 18th of June 1869. On the 10th of August 1869, the decree-holder deposited fees for the issue of the sale proclamation, and on the 24th of August he deposited fees for the sale. These deposits were made by the decree-holder with challans, unaccompanied by any written petition. The next application for execution was made on the 5th of August 1872, and the present one on the 19th of June 1875. When this last application was made, the judgment-debtor objected to its being granted, as the decree was barred at the date of the application made in 1872. The Moonsiff overruled the objection, on the ground that the deposits on the 10th and 24th of August 1869 were applications to keep the decree in force within the meaning of Act IX of 1871, Sch. II, Art. 167, which was not limited to applications under section 212, Act VIII

of 1859. The Moonsiff's decree was reversed in the lower Appellate Court, the Judge citing *Jibhai Mahipati vs. Parbhu Bapu*, I. L. R., 1 Bom., 59. The decree-holder then brought this special appeal.

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—  
Statement  
—

Baboo *Trilokhya Nath Mitra*, for Appellant, contended that a previous application for execution having been granted on the 6th of August 1872, no question as to the goodness or badness of that application could be enquired into in the Court below—*Eshan Chunder Bose vs. Prannath Nag*, 22 W. R., 512; 14 B. L. R., 143; *Rohinee Nundun Mitter vs. Bhugwan Chundur Roy*, 22 W. R., 154. He also contended that the proceedings before the 1st of July 1871—the date on which Act IX of 1871 came into force—could not be governed by the new law, as that would be giving to it a retrospective operation; and that they were, therefore, governed by Act XIV of 1859, under which the decree was not barred.

Moonshee *Serajul Islam*, for Respondent, referred to *Bemul Doss vs. Ikbal Narain*, 25 W. R., 249; and *Rughoo Nath Doss vs. Ranee Shiromonsee*, 24 W. R., 20.

Baboo *T. N. Mitra*, in reply, stated that the first point urged was neither raised nor decided in the cases referred to.

The judgment of the High Court (1) was delivered by

MORRIS, J. :—

MORRIS, J. .

The decree-holder is the special appellant in this case. The question is, whether the application, which was made on the 19th of June 1875, is within time or not. The Judge of Tipperah has held that it is not. The grounds of special appeal taken are : (1) that the lower Appellate Court is wrong in holding that the last application for execution was barred by limitation; and (2) that the lower Appellate Court is wrong in holding that the proceedings in execution taken before the passing of Act IX of 1871 are to be governed by the said law. The contention of the pleader who appears for the decree-holder, on the first ground raised in special appeal, is that a notice having been issued under the provisions of section 216, Act VIII of 1859, on the 7th of August 1872, and the present application being dated the 19th June 1875, he

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 ———  
*Judgment.*  
 ———  
 MORRIS, J.

is within time ; and that the Judge was not competent to look behind the date of the notice, and to take cognizance of any proceeding which had been taken before the date of that notice.

Now the Judge finds that on the 5th of August 1872, when the application was made by the decree-holder, upon which application the notice was issued under the provisions of section 216 of the Code of Civil Procedure, the decree was no longer alive; that it was barred, inasmuch as the application made prior to the 5th of August 1872, is dated the 18th June 1869, or more than three years before the later application. The pleader contends that the Judge, as we have already stated, is not competent to go behind the notice ; and that he ought to have held that the starting point was the 7th of August 1872, irrespective of the fact that the decree had already become barred by not being enforced between the 18th of June 1869, and the 5th of August 1872. In support of this contention he quotes two rulings, one in 22 W. R. 154—*Rohinee Mitter vs. Bhugwan Roy* ; and the other a Full Bench ruling in the same volume, page 512—*Eshan Chunder Bose vs. Prannath Nag* (also 14 B. L. R., 143). The first ruling, by Mr. Justice MARKBY, sitting with Mr. Justice ROMESH CHUNDER MITTER, decided that under the new Law of Limitation, Act IX of 1871, Sch. II, Art. 167, prescribing three years as the time within which applications should be made for execution of decrees, it was intended that there should be two specific dates from which the three years were to be counted without reference to any inquiry whether the proceedings were taken *bond fide* for the purpose of enforcing the decree, or were merely colourable for the purpose of keeping the decree alive.

Now in the present case the Judge could not have gone into the question whether the application and notice under section 216, Act VIII of 1859, was a *bond fide* application or a colourable application, but he was competent to decide whether any decree was alive or not at the time that application was made. He has done so, and has found that at the time that application was made the decree was not alive. With reference to the Full Bench decision, reported in 22 W. R., 512 ; 14 B. L. R., 143—*Eshan Chunder Bose vs. Prannath Nag*, the late Chief Justice, Sir RICHARD COUCH, who delivered the judgment of the Full Bench, observes that Act IX of

1871 clearly gives to a person who has a decree the power, so far as regards the Law of Limitation, of applying for execution of it within three years from its date, or within three years from the date of the application to the Court to enforce it or keep it in force; and that there is no restriction as to the second or third, or any subsequent application. Now this ruling assumes that the party who applies has a decree which is alive; and decides that he can make an application to enforce that decree, either within three years from its date, or from the date of any application made to enforce or keep in force that decree, or from the date of any notice which he may have issued under the provisions of section 216, Act VIII of 1859. We think that the view of the Judge in the present case is a correct view, and we, therefore, overrule the first ground of special appeal.

The second ground taken by the pleader for the appellant, is fully disposed of by the decision to be found in 25 W. R., 249—*Bemul Doss vs. Ikbāl Narain*. The principle of this decision is the same as that which has been affirmed by the Full Bench decision in 10 W. R., 9 (F. B.)—*Bisseshur Mullick vs. Mahatab Chunder*, which has not been in any way interfered with by subsequent rulings of the Full Bench. The appeal is dismissed with costs.

1878  
ANNODA  
PROSHAD RAI  
v.  
SHEIKH  
KURBAN ALI.  
—  
*Judgment.*  
—  
MORRIS, J.

## [CIVIL APPELLATE JURISDICTION.]

1878  
January 16.

NIL KANTO DEY . . . . . DEFENDANT;

AND

HURRO SOONDRI DASSEE . . . . . PLAINTIFF.

*Attachment—Right to receive Malikana—Act VIII of 1859, sections  
235, 237, 240.*

An attachment of a right to receive malikana from the Collector, if made under Act VIII of 1859, section 237, is not good, and will not invalidate a mortgage of the right executed while such attachment was pending.

Under that section attachment can be made only of a specific amount which may be set forth in the request as then payable or likely to become payable to the debtor.

**S**PECIAL APPEAL from an order passed by the Judge of Midnapore, modifying that of the Sudder Moonsiff of that district.

This was a suit for the recovery of money due on a mortgage bond which was executed on the 24th of September 1874. The property hypothecated was an eight annas share of malikana payable annually by the Collector to the two mortgagors.

On the 13th of September 1874, in execution of a decree obtained in the Court of the Subordinate Judge, a notice of attachment of the four annas share belonging to one of the mortgagors above mentioned, was given to the Collector. Under this attachment the four annas share of malikana was sold and purchased by the decree-holder, one of the defendants in this suit.

The mortgagee then brought this suit to enforce his mortgage bond against the two mortgagors and the purchaser of the four annas share at the execution sale. The main question was whether the attachment, which had been made under section 237, Act VIII of 1859, was valid and in force on the 24th of September 1874, the date of the mortgage. The Court of First Instance held that it was, but this decision was reversed on appeal. Defendant (the purchaser) then brought this special appeal.

Baboo *Sreenath Dass* and Baboo *Mohiny Mohun Roy*, for Appellant.

Baboo *Mohesh Chunder Chowdhry*, Baboo *Hem Chunder Banerjea* and Baboo *Omakali Mookerjea*, for Respondent.

1878  
NIL KANTO  
DEY  
v.  
HURRO  
SOONDEY  
DASSRE.

The judgment of the Court (1) was delivered by

Judgment.

JACKSON, J. :—

JACKSON, J.

The question which we have to determine in this case relates to the sufficiency or insufficiency of an attachment which the defendant, special appellant, had effected, and in respect of which he seeks to invalidate a mortgage set up by the plaintiff, of certain rights which the other defendants (1 and 2) had to receive a specified amount from the Collector annually, as compensation for their extinguished rights to certain *lakheraj* land. The attachment was made under section 237 of Act VIII of 1859, and if that attachment was sufficient, then, by section 240, the mortgage made during the attachment was invalid, and the purchaser at the execution sale would have acquired a right to receive such money free of any such mortgage. It is contended that it is an attachment properly made under section 237, inasmuch as the property consisted of money in the hands of an officer of Government, which was or might become payable to the defendant, or on his behalf; and that in such a case all that need be done for the purpose of attaching the property is to make a report to the officer in whose hands the money is, that the money may be held subject to the further order of the Court. It seems to me clear that an attachment of that kind is only good so far as it relates to any specific amount which may be set forth in the request as being then payable or likely to become payable to the defendant, and that that mode of attachment is not applicable to a right to receive money for ever such as is in question in the present case. It may be doubtful whether, in the circumstances of this case, the attaching creditor ought to have proceeded under section 235 or under section 236 of Act VIII of 1859. In either of these cases the defendant, the person to whom the money was payable, would be entitled to a notice; and it seems to me clear that this was a

(1) JACKSON and CUNNINGHAM, J.J.

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—  
*Judgment.*  
—

JACKSON, J.

case in which the debtor ought to have had a notice that he was not at liberty to alienate his rights. All that we need decide, however, is whether section 237 will govern the attachment of a right to receive money for ever. It appears to me that it will not. The decision of the Judge is therefore correct, and the special appeal must be dismissed with costs.

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## [CIVIL APPELLATE JURISDICTION.]

BHOOBUN DASS MUNDUL AND ANOTHER. DEFENDANTS;

AND

SRIMUTTY BILASHMONY DASSEE } PLAINTIFFS.  
AND OTHERS . . . . . }1878  
January 16.*Changing nature of Suit—Framing new Issues.*

A sued to eject a ryot on the ground of his holding over after the term of his pottah had expired. The ryot denied that he had ever held under a pottah from A, and alleged that the jote belonged to B. Plaintiff's allegations were found to be false, and his suit was dismissed. The lower Appellate Court directed B to be made a defendant, and remanded the suit to have the question of ownership tried between A and B; at the same time agreeing with the Court of First Instance that the allegations in the plaint were false.

*Held* that the lower Appellate Court should have dismissed the case, and was wrong in so remanding it.

*Per CUNNINGHAM, J.*—The right of framing new issues arises where the issues framed are insufficient to dispose of the matters raised in the plaint.

*Ram Dhum Khan vs. Haradhun Puramanick*, 12 W. R., 404, cited and distinguished.

**SPECIAL APPEAL** from a decree passed by the Subordinate Judge of East Burdwan, reversing that of the Additional Moon-siff of Cutwa.

Baboo Chunder Madhub Ghose and Baboo Radhica Churn Mitter, for Appellants.

Baboo Mohesh Chunder Chowdhry and Baboo Taruck Nath Palit, for Respondents.

The facts are sufficiently set forth in the following judgments :—

JACKSON, J. :—

It appears to us that the special appellants have good cause to complain of the procedure of the lower Appellate Court, and of the decision arrived at. The suit, as originally framed, was

1878 brought by the plaintiff Rakhal Dass against Bhoobun Mundul,  
 BHOOBUN upon the specific allegation that Bhoobun's father-in-law,  
 AND MUNDUL having executed a kabuliat in respect of 9 bighas 3 cottahs 8  
 AND ANOTHER chittacks of land, Bhoobun took up the kabuliat and occupied  
 v. the land, and had been compelled to pay rent to the plaintiff by  
 SEIMUTTY a decree obtained on the 27th of August 1872, on confession of  
 BILASHMOJNY judgment; that the defendant not relinquishing possession after  
 DASSEE judgment; that the defendant not relinquishing possession after  
 AND OTHERS. the expiry of the term, the plaintiff gave him notice to vacate the  
*Judgment.* jote, but he not having done so, the present suit was brought for  
 JACKSON, J. eviction of the defendant. Upon that the defendant put in a  
 lengthy written statement in which, after denying the plaintiff's  
 allegations, he averred that the plaintiff had no right whatever  
 in this land; and that the land was situated in a different mehal  
 from that owned by the plaintiff.

The Moonsiff who tried this suit originally framed this issue of fact, viz., whether the defendant had accepted the terms of the kabuliat alleged to have been executed by his father-in-law, and whether he had ever paid rents for the disputed holding to the plaintiff, and ever acknowledged him as his landlord. Upon that he found that the plaintiff's allegations were entirely false, and he dismissed the suit.

The Appellate Court entirely concurred upon this question of fact with the Court below, but strangely enough thought that a different and a much wider question ought to be raised; and that such question should be tried by adding a new defendant in the person referred to by the original defendant as the owner of Mehal Shyambag. Accordingly the Subordinate Judge directed a remand and a new trial upon the further issues which he laid down. Upon that new trial it was found by the Moonsiff that the disputed land belonged to the plaintiff as included within his Mehal Shyambag; and the finding was accordingly sent up to the lower Appellate Court; and, on a consideration of that finding, the Subordinate Judge reversed the original judgment of the Moonsiff and decreed the plaintiff's suit.

Now, the plaintiff's suit, as originally framed, was based entirely on the supposed relation of landlord and tenant subsisting between Bhoobun and the plaintiff; on the fact of the term having expired for which Bhoobun was said to have held the land; and on his refusal

to quit the land after that term had expired. It appears to me, therefore, when the plaintiff's suit was found to be entirely false, that it was not competent to the lower Appellate Court to widen the frame of the suit, and to bring in entirely new parties for the purpose of raising a wholly different question as to whether the plaintiff was the owner of the land in dispute and other lands; or whether the rightful owner was a person whom the plaintiff had not sued at all. It is suggested that this objection is one of a technical character, and we are referred to a decision in 12 W. R., 404—*Ram Dhun Khan vs. Haradun Puramanick*, in which it is pointed out that where the plaint discloses a title and a cause of action, the plaintiff's suit is not to be necessarily dismissed because he sets up other independent facts which he fails to prove. Now, if the plaint in this instance had included the facts which were raised on further trial, no doubt the plaintiff might very well have got a decree against Prannath and Bhoobun—supposing them to be originally parties to the suit—although he failed to prove that Bhoobun had come in under a kabuliat, and also failed to prove recovery of previous rent. But if the facts originally given be struck out of the plaint, both the Courts having found them to be false, absolutely nothing remains. I think, therefore, that the lower Appellate Court, when it found at the first hearing of the appeal that the decision of the Moonsiff was correct on the issue which he originally tried, ought to have dismissed the appeal, and ought not to have gone further. Consequently all the proceedings of the Subordinate Judge, beginning with the remand and ending with the reversal of the judgment of the Court below, are erroneous, and must be set aside; and the plaintiff's suit dismissed with all costs.

CUNNINGHAM, J. :—

I entirely concur in the judgment. The right of framing new issues arises where the issues are insufficient to dispose of the matters raised in the plaint. Here the issues did dispose of the matters raised in the plaint.

1878  
BHOOBUN  
DASS  
MUNDUL  
AND ANOTHER  
v.  
SRIMUTTY  
BILASHMONY  
DASSEN  
AND OTHERS.  
—  
Judgment.  
—  
JACKSON, J.

CUNNING-  
HAM, J.



## [CIVIL APPELLATE JURISDICTION.]

1878  
January 16.

**RASH BEHARY MOOKERJEE AND OTHERS PLAINTIFFS;**  
**AND**  
**KHETTRO NATH ROY AND ANOTHER . . DEFENDANTS.**

*Notice of Enhancement—Service of Notice—Assessment.*

Defendants held 29 beegahs and 83 beegahs of land; the former admittedly as tenants to the plaintiffs, the latter they claimed to hold rent-free. Plaintiffs brought a suit for arrears of rent on the 29 beegahs and the 83 beegahs pursuant to a notice of enhancement, service of which they failed to prove, and the suit was dismissed on that ground. In special appeal plaintiffs contended that the suit was for assessment and not for enhancement, and that no notice was necessary: *Held*, that having (as by the Rent Law they were entitled to do) treated the suit originally as one for enhancement, it was too late to shift ground in special appeal.

Where the service of notice of enhancement relied on has not been personal, it will not be valid unless it appear that an attempt has been made to effect personal service on all the defendants.

**SPECIAL APPEAL** from a decree passed by the Subordinate Judge of East Burdwan, affirming that of the Moonsiff of Cutwa.

This was a suit for arrears of rent at enhanced rates. Plaintiffs alleged that the defendants had ostensibly held under them and paid rent for 29 beegahs and odd; but that a measurement having been made, it was found that they were actually in possession of over 83 beegahs more; that, thereupon, they had served defendants with a notice of enhancement, for which enhanced rent they brought this suit. Defendants objected that they held no more than 29 beegahs and odd under the plaintiffs; that the remaining 83 beegahs were their own rent-free land; and that notice of enhancement was not served on them. The last objection proved fatal, and the plaintiffs' suit was dismissed in both the lower Courts. Plaintiffs then specially appealed.

*Baboo Rash Behary Ghose* and *Baboo Ashpoth Mookerjee*, for Appellants, contended that the suit was really one for assessment and not for enhancement, and, therefore, no notice was necessary.

The Respondents did not appear.

The judgment of the Court (1) was delivered by

JACKSON, J.:—

The plaintiffs in this case sued to recover rent in respect of 113 beegahs of land, for a part of which, viz., 29 beegahs and 5 cottahs, Rs. 39 had been for many years past payable and paid; and in respect of 83 beegahs 18 cottahs and 6 chittacks, they claimed Rs. 294 as rent which they had assessed on that quantity of land, in accordance with a notice served upon the defendants.

There were several defendants; but those who have contested this suit stated that they held only 29 beegahs 5 cottahs of land at a rental of Rs. 35, and Doorga Dass (one of the principal defendants) admitted that he was debtor in respect of a 6 annas share of that Rs. 35, the remainder being due from Hurrish Chunder and others. Hurrish Chunder and the other defendants alleged that there was an understanding under which Doorga Dass was to pay the whole of the rent of those 29 beegahs, but as regards the 83 beegahs they entirely denied that they held such quantity of land or any land in excess of 29 beegahs under the plaintiff. They all concur in saying that there were about 250 beegahs of land in the plaintiffs' mouzah, being the debutter endowment of a certain Thakoor of which they were sebaits. They also stated that a claim had been made on the part of the Government for resumption of these lands, which, however, ended in their favour.

The plaintiffs' suit was dismissed by the Court of First Instance, apparently on the ground that due service of notice had not been proved by the plaintiffs, and also on the ground that the plaintiffs could not show that they had ever collected any rent from the defendants in respect of the 83 beegahs. On appeal, the Subordinate Judge concurred with the Moonsiff as to the failure of proof of the service of notice; and, finding that to be the case, he might have dismissed the appeal and there stopped. But he also entered into the merits, and finally affirmed the judgment of the lower Court dismissing the suit.

Against this judgment various objections have been raised, one of which is that service of notice in this particular case was not necessary, inasmuch as it was not a suit for enhancement of rent,

(1) JACKSON and KENNEDY, J.J.

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BASH  
BEHARY  
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AND OTHERS  
v.  
KHETTRO  
NATH ROY  
AND  
ANOTHER.  
Judgment.  
JACKSON, J.

1878  
 RASH  
 BEHARY  
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 AND OTHERS  
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 KHETTRO  
 NATH ROY  
 AND  
 ANOTHER.

*Judgment.*

JACKSON, J.

but a suit for assessment. Now, it is one of the grounds of enhancement recognised by the Rent Law, that the tenant has been holding more lands than he was paying rent for. The plaintiffs themselves regarded the case as such, and issued notice accordingly. They cannot now be permitted to fall back upon the position that the case was not really one for enhancement. It seems to me indeed that it was.

Then it is said that the Court below had no ground for holding that notice had not been served. As to that, I think the Subordinate Judge gives good reasons for holding that the notice had not been properly served; because, although the peon who served it knew that some of the defendants were upon the premises—for he actually saw three of them conversing just outside—he made no attempt to serve them, but contented himself with sticking up the notice on the outer wall. This was a sufficient ground for the failure of the suit; and under the circumstances we refuse to go into the other points which are raised or might be raised upon this appeal. So far, therefore, the appeal must be dismissed.

But there appears to be an oversight committed by the Court below in failing to give the plaintiff a decree in respect of the Rs. 35 due on account of the 29 beegahs. To that extent the judgment ought to be in favour of the plaintiffs. The costs will be in proportion.

## [CIVIL APPELLATE JURISDICTION.]

RAM NUFFER BHATTACHARJEA . . . DEFENDANT;  
 AND  
 DHOL GOBIND THAKOOR AND OTHERS . PLAINTIFFS.

1878  
 January 16.

*Notice to quit—Special Appeal.*

Where a tenant denies his landlord's title, and persists throughout in a vexatious and aggressive course of conduct towards him he will not, in a suit for ejectment, be allowed in special appeal to assert that he has not been served with a notice to quit; that objection not having been taken in the Courts below.

**SPECIAL APPEAL** from a decree passed by the Officiating Judicial Commissioner of Chota Nagpore, affirming that of the Deputy Commissioner of Manbhoom.

This was a suit for possession of a mouzah. The plaintiff alleged they were the debutterdars of Doomooriah village in Pergunnah Jhulda, the zemindar of which is Bolloram Singh; that Ram Nuffer Bhattacharjea held the village from them as ijardar; that in the year 1873, with a view to try and secure the holding of the village at a fixed rent, he entered the village in the roadless returns as his permanently fixed rent-paying tenure, *mourosi istemrari*. The plaintiffs, upon learning this, gave the *mokurari* of the village to Koylanrai Bhotto, who interfered with Ram Nuffer's possession of the mouzah. Thereupon Ram Nuffer instituted a suit against him under Act XIV of 1859, section 15, and obtained a summary decree on the 29th of February 1874. The plaintiffs then brought this suit to break the title set up by Ram Nuffer and get possession of the village, making their zemindar and mokurarridar co-defendants.

The defendant, Ram Nuffer, denied the plaintiffs' case *in toto*; nevertheless, a decree was passed against him, which was affirmed on appeal. He then brought this special appeal.

Baboo *Mokiny Mohun Roy* and Baboo *Chunder Madhub Ghose*,  
 for Appellants.

1878 Baboo *Rash Behary Ghose* and Baboo *Ram Nath Pundit*, for  
 RAM NUFFE Respondent.

BRATTA-  
 CHARYA  
 v.  
 DHOL  
 GOBIND  
 THAKOOR  
 AND OTHERS.

The judgment of the Court (1) was delivered by

JACKSON, J. :— . . . .

*Judgment.*

JACKSON, J.

The plaintiffs brought the present suit to recover possession of Mouzah Doomooriah, by establishing *malikee lakheraj* debutter right, and for ejecting the principal defendants. The plaintiffs alleged that they received the Mouzah from the ancestor of the third defendant, anterior to the decennial settlement, as rent-free debutter, and that they have been in possession from that time in due course of succession. They further alleged that the first defendant was in possession of the mouzah under *ijarah* from them; that for fraudulent purposes he had inserted in the road-cess return a statement to the effect that his right was of an *istemrari jummai* nature; that, consequently, the plaintiffs did not think it advisable to leave the mouzah in the defendant's possession, and they made a *mokurarri* settlement of it with another person, who is the second defendant; that the said second defendant having, accordingly, taken steps to make settlement with the tenants, the principal defendant instituted a summary suit under section 15, Act XIV of 1859, to recover possession, and in that suit denied the *malikee* rights of the plaintiffs, and called his own right a *jote jumma*; and that the lessee, the second defendant, having, thereupon, retired from the contest and relinquished the lands, the plaintiffs brought the present suit to recover possession from the principal defendant.

The case of the defendant is, that he was in possession of the mouzah in dispute under the principal proprietor of the land, viz., the zemindar; and that he merely paid rent to the plaintiffs agreeably to the verbal direction of the zemindar. He denied that the plaintiffs had any right to bring the present suit. He set up various other pleas in bar of the suit; and, on the merits, he set out circumstances to show that his rights were in perpetuity and could not be cancelled; and also that he and his predecessors had gone to considerable expense in improving the land, and,

(1) JACKSON and CUNNINGHAM, J.J.

consequently, they could not be ousted without great hardship. Both the Courts below have found that the title set up by the defendant is not made out, and that the defendant was no more than a farmer holding at will. Having found this, both the Courts concur in holding that the defendant was not entitled to permanent possession of the village.

The only question raised before us in special appeal against the judgment of the lower Appellate Court is that, admitting the defendant to have failed in making out the permanent right which he set up, still, under the circumstances of the case, the plaintiffs were not entitled to a decree for possession, inasmuch as the tenancy which undoubtedly existed had not been determined by a reasonable notice. Now, this particular plea, it is manifest, has not been raised anywhere in the course of the proceedings below. Indeed it is raised in such terms in the memorandum of special appeal, that it was not at first obvious to us what the special appellant meant; and, although certainly the terms of the first ground of appeal may be construed to mean, and do probably mean, the objection to which I have referred, that meaning certainly would not strike any one at first sight. That being so, we may very well look not only at the course which the proceedings took below, but also at the whole conduct of the defendant, although he now sets up this ground.

We find, accordingly, that the conduct of the defendant was throughout hostile and vexatious to his landlord, and, I may say, aggressive; for (holding as he must be presumed to hold after the conclusive finding below that the defendant was in possession of this mouzah only as a farmer-at-will) we find him, in the first instance, making a fraudulent insertion in his road-cess papers that he had a permanent (*istemrari*) right; then we find him, on the landlord seeking to arrange with other lessees for this land, bringing a suit against the landlord and those lessees in which he denies the landlord's title; and finally in the written statement in the present suit, we find him not only re-asserting the *ijarah* in perpetuity which he had already claimed, but denying the plaintiff's right to bring any suit of this nature. Without going so far as to say that this course of conduct would in itself work a forfeiture; without at all impugning the general

1878  
 RAM NUFFEN  
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 AND OTHERS.  
 Judgment.  
 JACKSON, J.

1878  
**RAM NUFFER**  
**BHATTACHARJEA**  
v.  
**DHOL**  
**GOBIND**  
**THAKOOR**  
**AND OTHERS.**  
*Judgment.*  
**JACKSON, J.**

principle that a middleman as well as a ryot cannot be ejected from his tenure without a reasonable notice; we think that the conduct of the defendant in the present case has disentitled him from setting up want of notice, and that he may be considered to have been conscious of this, inasmuch as he has abstained throughout the proceedings, until he came to this Court, from raising any such objection. That being so, we think the special appeal must be dismissed with costs.

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## [CIVIL APPELLATE JURISDICTION.]

TOOLSEEMONY DEBEE . . . . . PLAINTIFF ;

AND

JOGESH CHUNDER SHAHA . . . . . DEFENDANT.

1877  
July 18.1878  
January 8.*Right of way—Exercise of right—Obstruction.*

A person who has a right of way cannot claim anything more than that the reasonable exercise of his right shall not be obstructed. It is only ownership of the land that carries with it the ownership of every thing *usque ad cælum*.

**A**PPEAL from a decree passed by Mr. Justice KENNEDY in the Ordinary Original Civil Jurisdiction of the High Court, dismissing the plaintiff's suit.

Plaintiff owned a house in Calcutta, to which the only approach from the street was by a private way that ran along the south side of defendant's house. Defendant built a verandah, overhanging the way, about ten feet from the ground. Plaintiff sued for a mandatory injunction to compel the removal of the verandah and for damages, on the ground that she was the owner of the soil of the way; and, in the alternative, on the ground that she had a right of way which the verandah obstructed. The claim to the ownership of the land was not proved.

The judgment of the Court of First Instance is as follows :—

1877  
July 18.

KENNEDY, J. :—

KENNEDY, J.

I think I perhaps went too far in allowing this case to go on after the claim for ownership of the soil of the lane had admittedly broken down. I thought, however, that if there had been any real obstacle, it might be advantageous to both sides to settle the question in this suit, but the alleged damage here is too shadowy. All that is suggested is that the carriage of bamboos and of the thakoor may be impeded. No doubt bamboos more than 11



1877-78  
 TOOLSEEMONY  
 DEBEE  
 v.  
 JOGESH  
 CHUNDER  
 SHAHA.  
 Judgment.  
 KENNEDY, J.

feet long may be required to be carried through the lane, but surely they are not always carried bolt upright; and, even if they were, there is plenty of room beside the verandah. Then, as to the thakoor, it is said that there is a possibility of one being elevated on men's shoulders more than 11 feet from the ground; but even that is not clear on the evidence, it rather appearing from one of the plaintiff's witnesses that the deity can pass with great comfort along the passage; and even if it were so high as alleged, it would pass under the verandah in the same way it does into the house door, which is much lower.

Then it is said that there is a possibility of nuisance being committed from the verandah. But any person committing such nuisance would be responsible for the act, and it might just as well be committed from the window. It requires some authority, which has not been shown, to satisfy me that where there is no obstacle causing any real or practical inconvenience—nothing save the bare fact of its overhanging ground over which the plaintiff has a right of way—there is any cause of action. In truth, there is authority which seems wholly inconsistent with such a proposition, although the circumstances and form of action were different—*Clifford vs. Hoare*, L. R., 9 C. P., 368. The mistake seems to have been made that the same rights *usque ad cælum* attach to an easement on land which attaches to the land itself. If mere overhanging were an obstruction when there was no practical inconvenience, it would be hard to account for the numerous cases one sees in England of arches over roads, both public and private; and indeed a statute would not have been necessary to give to particular persons the power of cutting branches overhanging public highways. Even, however, if there was that which conferred any right of action, the damages would be merely nominal; and it has been held that this Court ought not to give a decree for nominal damages. Nor do I think that without something of real injury or inconvenience to the plaintiff, an injunction should be granted.

It was contended, by an application of something like the language of TWYSDEN, J., in *Manby vs. Scott* (1), that this had a tendency to darken the passage, and that if verandahs were run all

(1) 2 Smith's Leading Cases; Smith on Contracts, 4th Ed., 418.

along on both sides it would darken it. The answer is, there is no evidence that the passage is at all darkened by the present verandah, and any person who makes any erection which does materially diminish the light will be responsible for so doing ; but that creates no liability for an act which causes no inconvenience to any one, and is not the basis of further buildings which may.

With the view that I have taken, it would have been useless consumption of the public time to permit the defendant to go into a case. As soon as there is any practical inconvenience there may be a right to come to the Court, or when there is a likelihood of the way being obstructed. I may notice that there was a serious mistake in one of the translations attached to the plaint which seemed to support the plaintiff's right to the soil, and may have induced her to bring this unfortunate action.

Plaintiff appealed.

*Bonnerjee*, for the Appellant, contended that actual appreciable damage was not necessary in this case to give a right of action—*Nicklin vs. Williams*, 10 Exch., 227; *Pindar vs. Wadsworth*, 2 East, 159.

[GARTH, C.J.—The observations in *Nicklin vs. Williams* were not necessary for the decision of that case. *Pindar vs. Wadsworth* does not apply here. The question is, was there sufficient space left for the reasonable exercise of your right; that is all you can claim.]

Counsel cited the rule laid down in *Mellor vs. Spateman*, adopted by WILLES, J., in *Bonomi vs. Backhouse*, E. B. & E., 622.

*Montrious and Sale*, for the Respondent, were not called upon.

GARTH, C. J. (MARKBY, J., concurring) :—

We think there is no ground for this appeal. The learned Judge, as it appears to us, was perfectly right in the view he took of the case.

The plaintiffs failed to prove what was their first and real ground of complaint, namely, that the soil of the passage belonged to them, and that the defendant, by building a verandah over it had invaded their property. Failing this, the plaintiff's only case was, that

1877-78  
TOOLSEK MONTY  
DEBER  
v.  
JOGESH  
CHUNDAB  
SHAH.  
Judgment.  
KENNEDY, J.

1878  
January 8  
GARTH, C.J.

1877-78  
TOOLSEEMONY DEBEE  
v  
JOGESH CHUNDEE SHAHA.  
—  
*Judgment.*  
—  
GARTH, C.J.

they had a right of footway over the passage; and they had then to prove, that the putting up of the verandah by the defendant was an interference with their reasonable exercise of that right. The learned Judge held that they did not prove this; and the suit was consequently dismissed. We consider, on the plaintiff's counsel's own statement, that the learned Judge was perfectly right in so deciding. The appeal is dismissed with costs.

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## [CIVIL APPELLATE JURISDICTION.]

GOVIND RAM MARWARI . . . . . PLAINTIFF;

AND

MONTORA SAHOO . . . . . DEFENDANT.

1878  
January 11.*Hundi—Notice of Dishonor—Onus.*

In a suit against the indorser of a *hundi*, absence of formal written notice of dishonor is not a sufficient defence, unless it is also shown that by absence of such notice the defendant has been prejudiced.

Where, in a suit by the indorsee of a *hundi* against his immediate indorser, the defendant pleads want of consideration, the *onus* is on him to prove his plea.

**SPECIAL APPEAL** from a decree passed by the Subordinate Judge of Bhaugulpore, affirming that of the Sudder Moonsiff.

This was a suit by the indorsee of a *hundi* against his immediate indorser, to recover the amount of the note with interest. After the note was accepted, but before it became due, the acceptor absconded; and, thereupon, the present plaintiff brought a suit on the bill against the present defendant, which was dismissed as premature. The *hundi* having become due and payable, plaintiff brought this suit. It was proved that he did not present the *hundi* for payment when it became due, nor did he give any notice of dishonor to the defendant.

The Court of First Instance, having thrown on plaintiff the onus of proving consideration, dismissed the suit, against which he appealed. The judgment of the lower Appellate Court is as follows: "The Moonsiff dismissed the case because the payment of consideration was not satisfactorily proved. In a case like this it would be presumed that the bill of exchange was endorsed for good consideration—Indian Evidence Act, section 114, Illustration c. The onus was, therefore, on the defendant to show that he did not receive consideration. I do not agree with the Moonsiff in thinking that in such cases it is not necessary that the notice of dishonor should be issued—*Jeetun Lall and Sheo Churn*, 2 W. R., 214; *Radha Gobind Shaha vs. Chundernath Dass Shaha*, 6

1878 W. R., 301; *Anunto Ram Agurwall vs. Nuthall*, 21 W. R., 62.  
 GOVIND RAM MARWARI v. MONTORA SAHOO.  
 Judgment. Mr. *M. L. Sandel* and Mr. *R. E. Sandel*, for Appellant.  
 JACKSON, J. Baboo *Tarucknath Sen*, for Respondent.

The judgment of the High Court (1) was delivered by

JACKSON, J. :—

The lower Appellate Court dismissed the appeal of the plaintiff, and, it may be said, virtually dismissed his suit on the ground that notice, that is to say formal written notice of dishonor, had not been served on the defendant. Now, neither the case which the lower Appellate Court cites from 21 W. R., 62, nor any other case has been brought to our notice which decides that in this country either a written formal notice of dishonor is necessary, or that the absence of such a notice would be a sufficient defence, unless it is shown that by such absence the defendant has been prejudiced. So far, therefore, the judgment of the lower Appellate Court appears to be erroneous, and must be set aside. But then there is another ground of defence, viz., that the defendants have not received consideration. The Subordinate Judge refers probably to Illustration c of section 114 of the Indian Evidence Act, which authorizes the Court to presume certain facts. The Court may presume, it says, "that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;" and he rightly says: "The onus was therefore on the defendant to show that he did not receive consideration." The defendant did give evidence and that evidence was disbelieved by the Court of First Instance. We think the lower Appellate Court ought to have inquired into that evidence, and to have found whether it could be believed or not. It was a point on which the defendants were entitled to have the opinion of the lower Appellate Court. The case will have to go back accordingly.

(1) JACKSON and CUNNINGHAM, J.J.

## [CIVIL APPELLATE JURISDICTION.]

GURU PRASHAD ROY AND ANOTHER . . . PLAINTIFFS;

AND

RAS MOHUN MUKHOPADHYA AND ANOTHER . DEFENDANTS.

1878  
January 11.*Procedure—Suit by Joint Mitakshara Family—Dissenting Co-sharer—  
Wrong action of Moonsiff—Duty of lower Appellate Court—Remand.*

Where a sum of money is due to a joint Mitakshara family, one of whom refuses to join in suing the debtor, the proper procedure for the other co-sharers is to sue the debtor for the whole amount, making the dissenting co-sharer a defendant.

Where the Moonsiff, acting erroneously, forced the plaintiffs to amend their plaint, and, in consequence of that amendment, the Moonsiff also amended the issues and tried the suit on an entirely erroneous issue, the Judge of the lower Appellate Court, as a Court of Equity, should, of his own motion, have sent the case back to the Moonsiff, directing him to try it on its merits, and pointing out that he had taken a wrong view of the law.

**SPECIAL APPEAL** from a decree passed by the Judge of Moorshedabad, reversing that of the Moonsiff of Berhampore.

Baboo *Bama Ohurn Banerjee*, for Appellant.

Baboo *Gurudas Banerjee*, for Respondent.

The facts of the case are sufficiently set forth in the following judgment of the Court (1) :—

The plaintiffs are the special appellants in this case. The suit, as originally framed, was a very simple one. The plaintiffs sued a Gomastah, who had been in their employ, to recover the sum of Rs. 110-14-11. They set out in their plaint that the plaintiffs and the defendant No. 2, who is a co-sharer, are joint members of a Hindoo family governed by the Mitakshara Law. That the defendant No. 1, who is the principal defendant, was a Gomastah employed for the collection of rents; that he was

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appointed on the 2nd of Assur 1280 (14th of June 1873); and that he absconded without giving an account of his stewardship; that they drew up a *Nikas* from the *Jumma-khurch-wasilat* and other papers furnished by the defendant, and discovered that they were entitled to the sum of Rs. 110-14-11. The defendant No. 2, refusing to join in the action, was made a co-defendant.

The Moonsiff insisted upon the plaintiffs stating what their share was in the estate. The plaintiffs demurred at first, stating that the family being a joint one governed by the Mitakshara Law they could not predicate what the extent of their share was without a butwarra being made. However, the Moonsiff insisted on their doing so, and they then stated that their share, namely the share of the plaintiffs who joined in the suit, amounted to four-fifths of the property. Upon this an issue was raised as to what was the share of the defendant No. 2, who refused to join in this suit. The case was tried as if the question in issue was whether the family were joint or separate, and what the respective shares of the litigants were. The Moonsiff referred to the genealogical tree of the family, and he also examined *khatas* and other books of account, to ascertain whether the estate was purchased from the joint or from separate funds, and he came to the conclusion that the family were joint and governed by the Mitakshara Law, and therefore, that the plaintiffs were only entitled to recover four-fifths of the sum originally claimed by them, which sum was further reduced by the Moonsiff to Rs. 61-6-9, instead of the sum of Rs. 110-14-11 originally claimed by the plaintiffs. He therefore gave the plaintiffs a modified decree for the sum of Rs. 61-6-9.

The defendants Nos. 1 and 2 appealed to the Judge. They of course valued their appeal with reference to the amount which had been decreed in favour of the plaintiffs, namely, Rs. 61-6-9. It is true that the plaintiffs did not file any cross-appeal, and that circumstance has led to the result that the whole suit has been dismissed by the Judge.

The Judge, we think, properly held that the decree of the Moonsiff as at present made could not stand, because he decreed a four-fifth share in the estate to the plaintiffs (co-sharers) who have joined in the present claim, and a one-fifth share to the co-

sharer who refused to join in the suit (1). But we think that, inasmuch as the plaintiffs were forced by the action of the Moonsiff to amend the plaint, and in consequence of that amendment the Moonsiff also amended the issues, and tried the suit on an entirely erroneous issue, the Judge, as a Court of Equity, when he found that the plaintiffs had filed no cross-appeal on a point which was forced upon them by the action of the Moonsiff, ought to have sent back the case to the Moonsiff, directing him to try it on its merits, and pointing out that he had taken an entirely erroneous view of the law; that it was unnecessary to enter into the question of shares; that the family was represented by the principal plaintiff as *kurta* of the family, by the other co-sharers who had joined in the suit, and by the defendant No. 2, who had been made a party to it.

The case must therefore go back to the Moonsiff, with reference to these remarks, for the purpose of being tried on its merits in the form in which the suit was originally laid. Costs to follow the result.

(1) This part of the judgment of the learned Judge is as follows:—  
 “In the present case, the plaintiffs adopted precisely the procedure suggested by PEACOCK, C.J., in *Rajah Ram Tewares vs. Lutchmun Pershad*, 12 W. R., 478. They even maintained their ground when they were first called on to specify their shares, but the lower Court uniformly insisted on putting them in the wrong . . . . It is a great pity they did not persist in maintaining their ground to the end, and appeal if they were dissatisfied with the order of the lower Court. As it is, they shifted their ground before the lower Court, through their pleader, by agreeing to sue for their separate shares instead of suing jointly for the full amount of their claim, and by doing this they entirely changed the character of their case. Then again, they have not made a cross-appeal, so it appears to me that I am compelled to do a hardship by decreeing the appeal against them on the illegality of their case as they finally put it, and as it was decided by the lower Court.”

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## [CRIMINAL REVISIONAL JURISDICTION.]

1878  
January 7.

IN THE MATTER OF CHUNDER SEEKOR } PETITIONERS;  
SOOKUL AND OTHERS . . . . }

AND

DHURM NATH TEWAREE . . . . OPPOSITE PARTY.

*Summary Trial—Section 222, Code of Criminal Procedure—Jurisdiction—  
Section 34, cl. iv.*

Where, on the facts found by a Magistrate, an offence is established which he cannot try summarily, he is not competent to convict for an offence made up of only some of those facts in order to give himself jurisdiction. Such proceedings are void under section 34, cl. iv. of the Code of Criminal Procedure, because he was not empowered by law to try the offender summarily.

Mr. C. Gregory, for Petitioner.

Mr. R. E. Twidale, for Opposite Party.

The facts of this case sufficiently appear in the judgment of the High Court (1), which was delivered by

AINSLIE, J. AINSLIE, J. :—

This matter has been brought before the Bench taking the criminal business of this Court, by order of the Judge in the English department in consequence of it appearing on the monthly statement of the Magistrate, that this was probably a case in which the Magistrate had gone beyond the law in holding a summary trial. The papers of the case were sent for, and it appears from the judgment of the Magistrate himself that the proceedings are bad. The conviction is recorded as under section 143 of the Indian Penal Code; but in the course of his reasons for the conviction, the Magistrate, among other things, says that "the assemblage of accused armed with swords and with a mob at their heels and their destruction by ploughing up the indigo sown on fourteen bighas have been established."

Now, taking it that the conviction was right on the merits, the

(1) AINSLIE and McDONELL, J.J.

fact that the Magistrate has found that the accused went armed with swords, brings the case under section 144 of the Penal Code; and it is quite clear that no Magistrate is entitled to cut down an offence from that which is established by the evidence in order to give himself summary jurisdiction. Having, as he says, evidence before him which shows that an offence, not triable summarily, had been committed, he was bound to try the accused for the offence in the ordinary way. He was, therefore, not empowered by law to hold summary proceedings in this case. That being so, the Court is compelled, under clause 4 of section 34 of the Criminal Procedure Code, to declare his proceedings void.

The whole of the proceedings and the orders made in this case must be quashed, and the Magistrate directed to proceed *de novo*. If any fines have been realized, the Magistrate must repay them to the parties by whom they were paid.

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AINSLIE, J.

## [CRIMINAL REVISIONAL JURISDICTION.]

1878  
January 10.

IN THE MATTER OF CHINIBASH GHOSE . . . . CONVICT.

*Examination of the Accused—Code of Criminal Procedure, Act X of 1872,  
section 250.*

Under section 250 of the Code of Criminal Procedure, the Court may, from time to time, at any stage of the case, examine the accused personally; but the Court is not competent to subject the accused to severe cross-examination. The discretion given by the law is not to be used for the purpose of driving the accused to make statements criminating himself; but only for the purpose of ascertaining from the accused how he is able to meet facts standing in evidence against him, so that these facts should not stand against him unexplained.

*Virabudra Gaud*, 1 Mad., 199, quoted and followed.

CASE referred by the Sessions Judge of Hooghly for confirmation by the High Court of the sentence of death passed by him on conviction of the prisoner of murder by the verdict of a Jury.

The facts of this case sufficiently appear from the following judgments of the High Court (1) :

KEMP, J. KEMP, J. :—

The prisoner has been convicted of the murder of a prostitute named Soorut. A majority of four out of five of the Jury convicted the prisoner under section 302 of the Indian Penal Code. The Sessions Judge concurs in that conviction, and has sentenced the prisoner capitally, subject to the confirmation of this Court.

We observe in this case that, before the evidence for the prosecution was recorded, the prisoner, Chinibash Ghose, was subjected to a very searching cross-examination. Now, under section 250 of the Code of Criminal Procedure, the Court may, from time to time, at any stage of the case, examine the accused personally; but it has been held by the Madras High Court (*Virabudra Gaud*, 1 Mad., 199), that the Sessions Court is not competent to subject the

(1) KEMP and MORRIS, J.J.

accused to severe cross-examination ; that the discretion given by the law is not to be used for the purpose of driving the accused to make statements criminating himself ; and that it can only properly be used for the purpose of ascertaining from the accused how he is able to meet facts standing in evidence against him, so that those facts should not stand against him unexplained.

Now, although there is no doubt that, as already stated, the Sessions Judge was competent, under the provisions of the above-mentioned section, to examine the accused, we think that he has gone far beyond the powers vested in him under section 250. In this particular case the examination of the prisoner extends over several pages, and he was cross-examined in a most severe manner before the case for the prosecution was even opened.

The charge of the Judge to the Jury is open to several objections. In the first place, it is not so much the charge of a Judge who is summing up the evidence, and leaving the weight of that evidence to the Jury to judge of ; but it is more like the summing up of an advocate on the part of the prosecution. Every point is taken against the prisoner, and many points in his favour are omitted. It is true that some points in his favour are alluded to by the Judge ; but he alludes to those points for the purpose of immediately neutralising their effect by placing his own views on those points before the Jury, instead of leaving the points in favour of the prisoner to the consideration of the Jury.

One of the points in favour of the accused, and this is a material point, is very cursorily alluded to in the charge ; namely, the fact that the body of the woman Soorut was found immediately after the occurrence of the murder, or within an hour or so, covered with blood. The police officers also describe the room in which the murder occurred as being here and there bespattered with blood. The prisoner, on his being arrested within an hour of the occurrence, is found to have marks on his clothing, which were supposed by the Police to be marks of human blood. Now his *dhotee*, or other clothing, was sent down for examination by the Chemical Examiner to Government ; and that officer has reported that those marks were not marks of blood.

This fact, which is one of the points in favour of the prisoner,

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is not placed as prominently as it should have been before the Jury. We now come to the consideration of the case itself. It appears to be clear that Chinibash, the accused, used to visit the woman Soorut. He had known her for some two years before the crime was committed; but his visits were not approved of by the witness Komul, who describes herself to be a bawd, under whose protection the woman Soorut lived. Komul tells us that she objected to the prisoner visiting Soorut, her girl, because he was not a good paymaster, and because his visits interfered with the visits of other parties in a better position to pay for the services of the deceased. In this case there appears to us to be no reasonable motive for the cruel murder with which the accused has been charged. Absence of a known motive is not, of course, sufficient to establish the innocence of the accused; but it is an important element in a case of this description, where we find a woman brutally murdered—for the medical officer deposes that she had seven severe wounds on the upper part of the body, viz., the head, shoulders, and neck; and that the spinal cord was severed.

The murder of this woman took place between the hours of seven and nine in the evening in the town of Budesshur. The house in which Soorut lived is in that town; and it is in evidence that there are several houses occupied by prostitutes and others in the immediate vicinity of that house. The constable, Lutchmun Patuck, (whose lodgings are also within a very short distance—a few cubits only—from the house of the deceased) states that he heard a *golmal*, and that he rushed to the house of Soorut; that he was very much agitated and confused at the sight of the body of the murdered woman; and that he does not remember whether the women (that is to say, the witnesses Komul Boishtomee, Mon Mohinee, Ranee Tamulinee and Khettro Mohinee) mentioned, at the time, the name of the accused as the murderer of the woman Soorut. The constable proceeds to the Police station immediately after viewing the body of the deceased, and arrives at that station within a very short time (less than an hour after viewing the body); and in his first statement to the Police (and this is always an important matter in a case of this description) he says that the name of the murderer is not known.

The women who have been mentioned above all depose that they clearly mentioned to the constable, Lutchmun Patuck, the name of Chinibash as the party whom they had seen rushing from the premises of the woman Soorut immediately after they heard the groans of the deceased.

It has been attempted to account for the fact that Lutchmun Patuck did not mention the name of the accused, by stating that he is an up-country man, a resident of the Benares district, and that he is not well acquainted with the Bengali language.

Now, that the constable knows the Bengali language is clear; for in his evidence he admits that he understood the women to say *Khoon hoyache, khoon hoyache*; and *Ei, Katya Palya Gyache*; and again, Shunker, who accompanied the constable to assist him in the apprehension of the prisoner, deposes that the constable made use of the following words when he, the witness Shunker, said, that he thought it was unnecessary to bind the hands of the accused; *Eto bora lok teen jon dhorite hoibe*. From this it appears to us clear that Lutchmun Patuck well understood the Bengali language. Further, we find from his evidence that he was personally acquainted with the accused previous to the occurrence of this murder; for he deposes that he met the accused on the day of the murder, and that the accused proposed to him, the constable, to accompany him on a visit to Benares. He further states that he observed on that occasion that the prisoner had an umbrella in his hand; that it was of a pink colour; that one of the ribs of that umbrella stuck out of the cover; and that that circumstance attracted his attention. Now a pink umbrella was found in the house of the murdered woman, and Lutchmun Patuck has deposed that that was the umbrella of the accused. There is also another witness who mentions that umbrella, but that witness is unable to speak with any certainty as to the ownership of the umbrella.

The identification of this umbrella by Lutchmun Patuck seems to us to be open to much doubt. It is difficult, too, to understand how the prisoner could have taken this umbrella to the house of the deceased, Soorut, on the evening of the murder; for when he was arrested very shortly after the murder, another and a very different umbrella was found in his possession. The evidence of

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Shunker, as well as that of the constable, Lutchmun Patuck, tends to prove that the prisoner was arrested when on his way home from the scene of the crime. It is not suggested how he found, or that he picked up, the umbrella that was found in his possession; we are, therefore, forced to the very unreasonable conclusion that the prisoner took two umbrellas with him to the house of Soorut, and took away only one of them, one which had in no way been previously identified, and left the pink one which the constable professes to have seen with the accused previous to the occurrence of the murder.

Then there is another very peculiar feature in this case, namely, that although these four women profess to have seen the accused running away from the house of the deceased immediately after the murder, and although they state that they mentioned the name of the accused to the constable as well as to the Police immediately on the arrival of that officer and the Police on the scene of the murder, yet the Assistant Magistrate who committed this case thought proper to take proceedings against two other parties, namely, Bhoot Nath Pal and Koonjo Telee, who were also in the habit of visiting the deceased Soorut. These two men were *chalanned* by the Police, and were called upon to prove their whereabouts on the night of the murder. Evidence was gone into in support of their respective defences; and, in the case of Bhoot Nath Pal, the Assistant Magistrate went so far as to make him produce the account books of a connection of his (who keeps a shop) to substantiate his defence.

Now, it is clear that if these women were speaking the truth and had seen the accused, Chinibash, rushing out of the house of Soorut immediately after the commission of the murder, and if the Police were in possession of the name of the murderer within a very short time after the occurrence of the crime, it would have been unnecessary for them to have *chalanned* Bhoot Nath Pal and Koonjo Telee. Then there is another fact in the case which is deposed to by the head constable, namely, that when the constable, Lutchmun Patuck, was deputed to apprehend the accused, the head constable sent Shunker and another man with him in order to identify the accused. Now, as already stated, the constable, Lutchmun Patuck, admits that he knew the accused, that he had

conversed with him on the day of the murder, and that he had observed the umbrella which was then in the hands of the accused ; and therefore it was wholly unnecessary, supposing that the constable is speaking the truth, to depute any person for the purpose of assisting him in the identification of the prisoner.

After careful consideration of the whole of the evidence in this case, we are not satisfied that the prisoner is guilty. We therefore acquit him on the charge on which he has been convicted by the Sessions Judge, and direct his immediate release.

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KEMP, J.

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I think that many circumstances in favour of the prisoner have not been properly laid before the Jury ; and, so much suspicion attaches to the evidence which connects the prisoner with the crime, I concur in directing his acquittal.



## [CRIMINAL REVISIONAL JURISDICTION.]

## [FULL BENCH.]

1878  
February 18.  
—

## IN THE MATTER OF BAIDYANATH DASS (CONVICT.)

*Act XXI of 1856, section 49—Confiscation—Fine—Summary Trial—Code of Criminal Procedure, section 222.*

The confiscation which is provided for by section 49, Act XXI of 1856, is merely a consequence of the conviction, and does not form part of the punishment for the offence. An offence under that section, which is punishable with fine, may, therefore, be tried summarily by a Magistrate under section 222 of the Code of Criminal Procedure, Act X of 1872.

*Khetter Mohun Chowringi*, 22 W. R., Cr., 43; and *Juddoo Nath Shaha*, 23 W. R., Cr., 33, overruled.

**T**HIS case was submitted to the High Court by the Officiating Sessions Judge of Rungpore, with a recommendation that the order of conviction and sentence passed by the Magistrate on Baidyanath Dass be quashed, on the ground that the Magistrate had tried the case summarily, the offence being one which could not be so tried under section 222 of the Code of Criminal Procedure. The facts of the case were these: The prisoner was charged with the illegal possession of ganja. He was tried summarily before the Magistrate, convicted, and sentenced to pay a fine of Rs. 200. The Magistrate further directed that the ganja found in the prisoner's possession should be confiscated.

The Division Bench (MARKBY and PRINSEP, J.J.) referred the case to a Full Bench in the following terms:—

“The matter which remains for our decision is whether an offence under section 49, Act XXI, 1856, can be tried summarily by a Magistrate under section 222 of the Code of Criminal Procedure.

“The punishment for that offence (on which this matter depends) is thus described: The offender ‘shall forfeit for every such offence a sum not exceeding Rs. 200.’ It is further stated ‘and the liquors and drugs, together with the vessels, packages

and coverings in which they are found, and the animals and in conveyances used carrying them, shall be liable to confiscation.'

"Section 222 of the Code declares that the Magistrate of the District may try certain offences in a summary way, and among these offences are 'offences referred to in section 148 of this Code.' Such offences are described in the Code (section 4) as '*Summons cases.*' Section 148 is to the following effect: 'When a complaint is made before a Magistrate having jurisdiction in the case, that any person has committed, or is suspected of having committed, any offence triable by such Magistrate and punishable with fine only, or with imprisonment for a period not exceeding six months, or with both, the Magistrate may issue his summons directed to such person, requiring him to appear at a certain time and place before such Magistrate to answer to the complaint.' So only offences punishable with 'fine only or imprisonment for a period not exceeding six months, or with both,' would be triable in a summary way under the first clause of section 222, already quoted.

"Is an offence under section 49, Act XXI, 1856, one punishable *with fine* only; or does the confiscation which follows on conviction form a part of the punishment so as to alter the character of the offence as regards the mode of trial to be adopted?

"In two reported decisions of this Court (*Khetter Mohun Chowringi*, 22 W. R., Cr., 43; *Juddoo Nath Shaha*, 23 W. R., Cr., 33) it has been held that such offences are not summons cases, and therefore are not triable in a summary way, because they are punishable with confiscation as well as with fine. We have great doubts regarding the correctness of those decisions—doubts which, we would add, are shared by the only Judge of this Court now present who was a party to one of those decisions. We are informed that Magistrates constantly try offences of this description summarily, probably in ignorance of the rule laid down in these decisions, and we therefore think it right to submit the matter to be authoritatively settled by a Full Bench of this Court. We are inclined to hold that such an offence can be tried summarily, as a '*summons case*,' for the following reasons, which we state because the parties to this case

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are unrepresented, and therefore it is not probable that there will be any argument at the bar.

“For the procedure in the trial of offences, the Code has divided them into three classes—summons cases defined in section 148; warrant cases defined in section 149; sessions cases or trials in the Court of Session defined in section 4. If the offence under section 49, Act XXI, 1856, is not a summons case, it must be either a warrant case or a sessions case; and whatever opinion may be expressed regarding its falling under the category of summons cases, it clearly cannot fall within either of the two other classes. No special mode of trial has been prescribed for such an offence, and it is difficult to suppose that such cases were overlooked by the Legislature. The proper solution of this difficulty seems to be to regard confiscation not as a punishment contemplated by the Code of Procedure so as to affect the mode of trial.

“It may be said that a sentence is the declaration of the punishment imposed. Section 20 of the Code of Criminal Procedure sets forth the powers of Magistrates in passing sentence, and these powers are limited to imprisonment, fine, and whipping. It is in consideration only of such punishments that the Code has prescribed the different modes of trial; and, though confiscation of certain articles may be awarded on conviction of any offence under a special or revenue law, such confiscation is not taken into account by the Code so as to form a portion of the sentence or to affect the nature of the offence or the mode of trial. Further, we observe that section 8 of the Code in providing for the trial of offences under local or special laws states that ‘no Court shall award any sentence in excess of its powers;’ and ‘the powers of Magistrates in respect to passing sentences on persons convicted’ are set forth in section 20, which, as already stated, only refers to three kinds of punishments—imprisonment, fine, and whipping. Confiscation under Act XXI, 1856, and also under the Salt Act, can, however, be ordered by a Magistrate. Under these circumstances, we are inclined to hold that confiscation is no part of the sentence or punishment under the Code of Criminal Procedure, but that it follows as a consequence of the conviction.

“The question referred is that stated in the first paragraph of this reference. If the answer to the question be in the affirmative,

the conviction will stand. If the answer be in the negative, the conviction and sentence, including the order of confiscation, will be set aside, and a new trial ordered."

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The judgment of the Full Bench (1) is as follows :—

We are clearly of opinion that an offence under Section 49, Act XXI, 1856, can be tried summarily by a Magistrate under section 222 of the Criminal Procedure Code. The confiscation, which is provided for by section 49, is merely a consequence of the conviction, and does not form part of the punishment for the offence. We observe that in the case of *Khetter Mohun Ohow-rungi*, 22 W. R., 43, to which we are referred, the question which we are called upon to decide was given up by the Government Pleader without argument, and that, in the second case, the learned Judges merely followed the ruling in the first. So that this would appear to be the first occasion on which the point has been seriously considered.

(1) GARTH, C.J., KEMP, JACKSON, MARKBY and AINSLIE, J.J.

## [CIVIL APPELLATE JURISDICTION.]

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January 4.

SREEMUTTY DASSI MONI DASSI . . . DEFENDANT ;  
AND  
CHOWDHRY JONMAJOY MULLICK . . . PLAINTIFF.

*Mortgagee's Lien—Money-Decree.*

A mortgagee who elects to take a money-decree, and becomes himself the purchaser of the property mortgaged at a sale in execution of that decree cannot bring a suit to enforce his lien against a person who purchased the right, title, and interest of the same debtor in the same property, at a prior sale in execution of a prior money-decree.

**SPECIAL APPEAL** from a decree passed by the Judge of Midnapore, reversing that of the Subordinate Judge of that District.

This suit was brought against two parties, Sreemutty Dassi Moni Dassi and Narendro Nath Mytee, under the following circumstances : On the 26th of August 1868, the late father of the second defendant borrowed money from the late husband of the first defendant, under a simple money bond. On the 10th of January 1869, the same person borrowed money from the plaintiff by a specially registered mortgage bond which hypothecated two estates for the payment of the loan. On the 22nd of February 1871, plaintiff obtained a simple money-decree on this specially registered mortgage bond. On the 24th of February 1871, the other creditor, the husband of the first defendant, in execution of a decree previously obtained by him for his debt, bought at auction, for Rs. 45, the right, title, and interest of his debtor in one of the properties which had been mortgaged to the plaintiff. Subsequently, the plaintiff took out execution of his money-decree, and, on the 30th of June 1871, his debtor's right, title, and interest in the same property was again put up to sale, and was bought in by the plaintiff himself.

Plaintiff brought the present suit to have it declared that the first defendant holds the property subject to his mortgage, alleging

that the sale caused by himself in June 1871 was a nullity, inasmuch as the debtor had previously ceased to have any right, title or interest in the property then put up for sale.

The lower Court dismissed the suit on the ground that the plaintiff's lien was gone, he having sold the mortgaged property for the satisfaction of his debt. This decision was reversed on appeal. The first defendant specially appealed.

Baboo *Srinath Dass* and Baboo *Bhowany Churn Dutt*, for the Appellant, contended that the judgment of the Court of First Instance was correct; also, that the suit was barred under Act VIII of 1859, section 7.

Baboo *Mohiny Mohun Roy* and Baboo *Rash Behary Ghose*, for the Respondent.

The judgment of the Court (1) was delivered by

KENNEDY, J.:—

KENNEDY, J.

The plaintiff originally had a simple mortgage bond charging the lands in question in this suit with others, and specially registered under the provisions of the Registration Act. The lands having been attached by some other creditors, the plaintiff, two days before the day for sale under that attachment, obtained a summary decree under the provisions of the Registration Act. It is difficult to believe that he was not aware of the immediate proximity of the sale, or that the course he took was not adopted in reference to that fact.

The first defendant purchased at the sale under that attachment; and the plaintiff having subsequently sold the right, title, and interest of the mortgagor in the mortgaged land, under an attachment issued upon his summary decree, and himself purchased it, he was unable, he says, to reap the fruits of his purchase in consequence of the antecedent sale to the first defendant.

The present suit is brought against the mortgagor and the first auction-purchaser to enforce the lien created by the mortgage bond against these lands.

The difficulty in which the plaintiff has been placed is entirely one of his own creation. Instead of suing the mortgagor on his

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bond, and obtaining a decree declaring his lien, and directing the lands to be sold towards satisfaction of it, he adopted a course which ensured the lands being sold so as to realize the least market price possible. The course is one frequently adopted in Bengal, but this frequency cannot make it less liable to be stigmatized as oppressive, if not fraudulent.

However this may be, the question for us now to decide is whether the present suit can be maintained, and we have come to the conclusion that it cannot, and that the decision of the Full Bench in *Hurro Chunder Ghose vs. Dinoo Bundoo Bose*, 23 W.R., 187, preclude us from giving the relief sought.

In the second suit, which was before the Full Bench, it appears that the nature of the proceedings must have been precisely the same as those here, for Mr. Justice JACKSON says that in it "the plaintiff sought a fresh decree for the unsatisfied portion of his claim, as well as a declaration of lien as against the alienee. Upon the considerations already stated, I am of opinion that the Moonsiff who granted only the latter prayer was right, and that the Judge who altered the decree was wrong." The majority of the Full Bench, however, did not concur in this opinion, and both cases were dismissed.

We are unable to distinguish that case from the present, and think that we are bound to follow it, notwithstanding some observations which were made in the judgment of the majority, and which would be inconsistent with the ultimate decision, if they could be construed as the respondent here contends. Possibly, they would apply in cases where the property had been alienated before the institution of summary proceedings by the mortgagee, and this view would reconcile with the Full Bench decision, the ruling of GLOVER and MITTER, J.J., in page 461 of the same volume—in which it appears that, certainly before the decree, the mortgaged property had been sold.

Here, there being no intervening charge or interest, the plaintiff deliberately elected, for his own reasons, to take a mere money decree against the mortgagor.

The Full Bench did not think it necessary to decide the question raised under section 7 of the Civil Procedure Code, and for the same reason we need not now do so; but it is by no means certain

that the operation of that section would not, in itself, be an answer to this suit, as a suit in which full relief could have been given might, at the time of the summary decree, have been instituted against the mortgagor. We decide nothing about any other remedy which may be open to the mortgagee, but we must restore the judgment of the Subordinate Judge.

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NOTE.—Where land is pledged as security for the payment of money the position of the parties seems to be this : The debtor is under an obligation to pay the money at a certain time ; till that time comes the creditor has no actual, but only a contingent, interest in the land ; but when the obligation to pay the money arises, the right of the mortgagee (as he is called) to cause a sale of the land springs up with it. Suppose a bond is conditioned that, in the event of non-payment by A of £1,000 to B on the 31st of December 1878, B may bring an action and sell *Blackacre* for the amount of his debt, and suppose that payment be not made ; then, on the 1st of January 1879, there is due and payable from A to B a debt of £1,000 ; and B may call upon the Court to sell the land in satisfaction of that debt. Now, if A pays the £1,000, or if in any way, on behalf of A, B gets that £1,000, his right to call for a sale of the estate is gone ; because his right of sale depended on the obligation under which A was of paying the debt, and that obligation having vanished, the collateral right which owed its existence thereto has gone with it. If it is, as it undoubtedly is, the obligation binding the mortgagor to pay the money that creates and keeps in existence the mortgagee's right of calling on the Court to sell the land, then in whatever manner the mortgagor's obligation to perform his promise is extinguished, the mortgagee's right should, in the same way, and by the same means, also be extinguished.

There is no rule better established than that where a judgment is recovered on an obligation, that obligation is gone—*transit in rem judicatum*—and can never be the subject of another suit. (*King vs. Hoare*, 13 M. and W., 494 ; *Roop Lall Mullick vs. Rajendro Narain*, reported *post*, 488). It would seem, then, that in every case where the mortgagee brings a suit to compel the mortgagor to pay the debt and gets a money decree, the mortgagor's original obligation is gone. He is no longer bound to perform his promise to pay the debt to the mortgagor : he is under a new and totally different obligation, namely, to satisfy the decree which has been passed against him ; and the mortgagee's right to call for a sale of the land as



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it stood at the date of the mortgage, which depended on the existence of the original obligation is, on principle, extinguished. This point seems to have been settled by the case of the *European Central Railway Company*, 4 Ch. D., 33, the facts of which may be stated as follows: The Railway Company agreed to pay to the plaintiff £1,000 on the 11th of October 1865, with interest to that date, at the rate of 6 per cent. per annum; and, to secure the payment, pledged the land and works of the Company. Plaintiff sued on his bond and got a money-decree on the 25th of November 1865. In January 1868, the Company was ordered to be wound up, and the plaintiff claimed to prove for the amount of the decree with 6 per cent. interest on the £1,000 from the date of the decree. This proof was disallowed by the Official Liquidator on the ground that the decree only carried four per cent. per annum interest, by virtue of the 1 and 2 Vic., c. 110, section 17. A summons was taken out before V.-C. BACON to compel the Official Liquidator to receive the proof for the additional 2 per cent., which was refused by the Vice-Chancellor on the ground that the debt had merged in the judgment. Plaintiff appealed; and on the appeal, contended that the judgment of the lower Court was wrong, because, besides the agreement to pay the debt, he had a lien on the lands, &c., of the railway to secure its payment, and the taking of the money decree did not destroy that lien. The Court of Appeal held that it did; and that from the date of that decree the only obligation by which the defendant remained bound to the plaintiff was to pay the amount of the decree with the statutory interest at four per cent. It was admitted by Baron BRAMWELL, who delivered the considered judgment of the Court, that, had the plaintiff not taken a money decree, he could have proved for the 6 per cent., but "here the original debt is gone—*transit in rem judicatum*. A fresh debt is created with different consequences. The judgment is now the charge. There cannot be two debts—one leviable by execution, the other charging the undertaking. There cannot be a charge for more than is due. It is said that it is a hardship upon the appellants, because they are worse off by reason of their diligence in bringing the action; but they were not compelled to bring the action. They brought it in order to obtain the advantage of an execution. If, therefore, there has been any hardship, it was not inflicted upon them by the law so as to make us doubt whether the law could be so. . . . There is no other agreement than that which has been converted into a judgment; there is no other debt or obligation affecting the parties." This decision is certainly in favour of the proposition that the taking of a money-decree on a mortgage bond extinguishes the mortgage lien for good and all.

That seems to be the conclusion to which, on the whole, the decisions of our Courts tend, though it is somewhat difficult to reconcile them one with another. The Full Bench decision in 23 W. R., 187, has been frequently cited as deciding that the lien passes to the person purchasing the property hypothecated at a sale in execution of the money-

decree, and no doubt the wording of the judgment seems to favour that contention; but, as pointed out by Mr. Justice KENNEDY in the text, all that was really decided is that after the sale the mortgagee has no lien, which is a totally different proposition. Indeed, it would be difficult to support the contention that the lien does so pass, in face of the case of *Baijun Doobey vs. Brij Bookun Lall Awusti* (I. L. R., 1 Cal., 133; L. R., 2 Ind. App. 275), lately decided by their Lordships of the Privy Council. It was there laid down that a Hindu widow, subject to the Mitakshara Law, has a right to maintenance out of the estate of her deceased husband; that it is a debt due to the widow from every person into whose hands the inheritance comes; and that she has a lien on the inheritance as a security for its payment. Yet the Privy Council held that a sale under a money-decree obtained by the widow for her maintenance against the heir in possession of her late husband's property, only carried the right, title and interests of the judgment-debtor, and that the lien did not pass.

That a sale under a money-decree passes the right, title and interest of the judgment-debtor from the date of the attachment under which the sale took place, seems settled by the cases of *Puddomonee Dossee vs. Muthooranath Chowdry*, 12 B. L. R., 411; and *Mussamat Matonginy Dassee vs. Chowdhry Jonmajoy Mullick*, 25 W. R., 513. The main ground of the decision of their Lordships of the Privy Council, in the former case, appears to have been that the purchaser was not entitled to claim under the judgment-creditor, but under the judgment-debtor.

How then can the lien, which is the right of the mortgagee, a third party, pass under that sale? Or how can the right, title and interest of the judgment-debtor at the date of the mortgage so pass? To hold that it does, seems allowing the provisions of the sale certificate, notification and decree to be overridden by the plaint and written statement, or the evidence produced by the parties in the cause.

There does not seem to be any alternative between holding that the lien is extinguished by the money-decree and holding that it passes to the purchaser at the subsequent sale. In the case of *Khub Chand vs. Kalian Dass* (I. L. R., 1 Alla., 240) a Full Bench of the Allahabad High Court seemed to be of opinion that the lien neither is extinguished by the money decree nor passes by the sale; but the learned Judges did not give their reasons for coming to that conclusion; which is one extremely difficult to support on principle. It is stated in that case that the simple mortgage comprises "two contracts—a personal obligation on the part of the mortgagor to pay the debt, and a contract empowering the mortgagee to have recourse to the property pledged as a collateral security," and that these two contracts give rise to two distinct causes of action. With great deference it is submitted that this view is erroneous. The only obligation on the part of the mortgagor is to pay the money; there is also a stipulation that in the event of default the creditor can call upon the Courts to sell the land

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as it stood at the date of the mortgage. Nothing can give a right to bring an action except the breach of the obligation; the stipulation is merely an additional security for repayment, which of itself can confer none. Even where the deed contains a promise by the mortgagor not to alienate, a breach before the date of payment would only give the mortgagee a right to rescind, or to bring a doubtful action for damages. This, however, has nothing to do with the point under consideration, namely, whether more than one cause of action arises out of the non-payment of the debt by the mortgagor. There seems to be no valid reason for holding that more than one does so arise; and this, if correct, is sufficient to dispose of the doctrine laid down in the Allahabad case. For either the lien is extinguished by the money-decree or it is not. If it is, there is an end of the matter. If it is not, then it must be insisted that besides the remedy given by the Legislature for the realization of the debt, namely, by attachment and sale, there is another remedy by enforcing the lien; and this is opposed to the well-known rule that where the Legislature expressly lays down a course of procedure for the purpose of procuring satisfaction of an obligation (in this case, payment of the amount of the money-decree) that method is the only one available. In other words, either the old debt is extinguished by the new one created by the money-decree, or it is not. If it is extinguished, it is difficult to see on what ground it can be held that the remedy which owed its existence and continuance to the original obligation still remains. If the money decree does not extinguish the old debt, but is, essentially, the latter under a new form, then the Legislature has prescribed the manner in which the obligation, as at present constituted, is to be enforced; and, on principle, there seems to be no other way of enforcing it.—Ed.

## [CIVIL APPELLATE JURISDICTION.]

SREENATH CHUNDER CHOWDHRY } PLAINTIFFS ;  
 AND OTHERS . . . . . }  
 AND  
 MOHESH CHUNDER BUNDOPADHYA } DEFENDANTS.  
 AND OTHERS . . . . . }

1878  
 January 17.

*Apportionment of Rent—Frame of suit—Co-sharers and tenants defendants.*

Three out of five co-sharers, proprietors of certain mouzahs, brought a suit against the patnidars for the proportionate amount of the rent due to them, and for the determination of that amount, making the two remaining sharers defendants : *Held*, that the suit was properly framed.

**S**PECIAL APPEAL from a decree passed by the Judge of West Burdwan, reversing that of the Moonsiff of Bishenpore.

This was a suit for the recovery of arrears of rent for the year 1279 (1872-73), amounting to Rs. 188, plaintiff's share of the rent due to them and two of the defendants jointly. It appeared that one Rajah Gopal Singh Deb was the proprietor of seven mouzahs which were let in patni to two of the defendants in the present suit, at an annual rent of Rs. 240. Those seven mouzahs were sold in execution of a money-decree against Rajah Gopal Singh Deb on the 20th of February 1866 ; three were bought by the present plaintiffs and the other four by two of the present defendants. The defendants contended, *inter alia*, that the plaintiffs were not entitled to maintain the present suit without effecting a batwara of the seven mouzahs, or ascertaining the extent and area of the lands for which the proportional determination of the rent was sought ; and that an assortment of the kinds and qualities of the various lands would be indispensable in order to come to a clear determination of the rent by the rule of proportion. The Court of First Instance gave plaintiff a decree, which was reversed on appeal. The Judge said : " It was held that a suit like the present could not be brought under Act X of 1859 (W. R., 1864, Act X. Rul., p. 16) ; and the transfer of the trial of

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suit from the Revenue to the Civil Court does not enable the plaintiffs to expand the provisions of the law (21 W. R., 88). There are several decisions to the effect that a separate suit for a share of rent will not lie (15 W. R., 1, F. B. ; 22 W. R., 359 ; 22 W. R., 526) ; and though these cases had reference to ryoti holdings, the same reasoning would apply with equal or even greater force to tenures of a patni nature. Plaintiffs therefore, have not only misjoined two causes of action, but the second action is one which they cannot maintain." Plaintiffs then brought this special appeal.

Baboo *Rash Behary Ghose*, and Baboo *Golap Ghunder Sircar*, for the Appellants.

Baboo *Chunder Madhub Ghose*, Baboo *Bungshee Dhur Sen*, and Baboo *Judoonath Mookerjee*, for the Respondents.

The judgment of the Court (1) was delivered by

JACKSON, J. JACKSON, J. :—

We think this suit has been thrown out by the lower Appellate Court on grounds which are not valid. The object of this suit really was to determine what amount of rent was due by the first and second defendants to the plaintiffs, and to determine that in such a manner as should be binding upon the persons called co-defendants, who are, it seems, jointly entitled to the remainder of the rent arising out of that tenure. It appears to us that the framing of the suit was convenient, and calculated to avoid needless expense. The Judge ought to have gone into the other questions raised, and the case will be remanded to him for that purpose.

(1) JACKSON and CUNNINGHAM, J.J.

## [CIVIL APPELLATE JURISDICTION.]

BUNYAD MAHTON AND OTHERS . . . . . PLAINTIFFS;  
 AND  
 NATHOO SAHOO . . . . . DEFENDANT.

1878  
 February 17.

*Arbitration—Judgment according to award—Act VIII of 1859, sections 325, 327—Application to have an award filed in Court—Appeal.*

Where there has been an award, and the decree passed by the Court below is in accordance with that award, that judgment is final. But where it can be shown that there was not in fact any award on which a judgment could be based, there is no final decree, and an appeal will lie.

The fact that the arbitrators themselves clearly doubt the correctness of their decision is a strong objection to the finality of an award. It is one which tends to show that the award is not valid; and on this ground an appeal will lie against an order granting an application to have an award filed in Court.

*Sreenath Chatterjea vs. Koylash Chunder Chatterjea*, 21 W. R., 248; and *Lalla Ishuree Pershad vs. Hur Bhunjun Tewaree*, 15 W. R., 9, F. B.; 8 B. L. R., 315, discussed.

**SPECIAL APPEAL** from an order passed by the Judge of Bhagulpore, reversing that of the Sudder Moonsiff of Monghyr.

This was an application to have an award filed in Court, and for the enforcement thereof. A dispute between the parties regarding the possession of certain land was referred to arbitration of five persons, four of whom made an award on the 29th of August 1875. An application for a re-hearing of this decision was made by the defendant to the arbitrators, who issued a notice calling on both parties to put in additional evidence on the 15th of November 1875. On the 19th of March 1876, the petition for re-hearing was rejected, the order of rejection being signed by two of the arbitrators only. On the 28th of February 1876 the plaintiff petitioned that the award be made a rule of Court. Defendant objected on the ground that no proper award had been made; and that, as one of the arbitrators had since died, the agreement to refer had become imperative.

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The Court of First Instance gave plaintiff a decree, which was reversed on appeal by the lower Appellate Court. Plaintiff then brought this special appeal.

Baboo *Mohesh Chunder Chowdhry*, and Mr. *M. L. Sandel*, for the Appellants, contended that the decree of the Moonsiff, having been passed according to the award, was final; and that, therefore, the lower Appellate Court acted without any jurisdiction in hearing an appeal from it. It was also contended that, when the arbitrators gave their award, their functions as arbitrators ceased, and they were therefore unable to grant a review of their decision—*Lalla Ishuree Pershad vs. Hur Bhunjun Tewaree*, 15 W. R., 9, F. B.; 8 B. L. R., 315; *Sreenath Chatterjea vs. Koylash Chunder Chatterjea*, 21 W. R., 248; *Nim Roy vs. Lalmun Roy*, 25 W. R., 376.

Mr. *C. Gregory* and Baboo *Amarendro Nath Chatterjea*, for the Respondent.

The judgment of the Court(1) was delivered by

JACKSON, J. JACKSON, J. :—

The parties in this case appear to have referred certain matters in dispute between them to arbitration by five persons named in the plaint. The course of proceedings before the arbitrators is not very clear; but it would seem that four of them made an award on the 27th August 1875. On the 3rd September, or five days afterwards, the same arbitrators granted an application made by one of the parties for a re-hearing of the matter. Before the re-hearing took place, one of the four died, and finally an order appears to have been made by two of the survivors striking off the application. On the 21st of February, or within one day of the expiration of the six months allowed by law, certain of the parties interested made an application to the Court, under section 327 of the Code of Civil Procedure, that the award might be filed, and thereupon Nathoo Sahoo, the other party interested, showed cause against the award being filed. He said: "The award relied upon by the petitioners which was made with a difference of opinion among the arbitrators has been, agreeably to the request of the opposite party, referred to the arbitrators

(1) JACKSON and CUNNINGHAM, J.J.

for review of judgment, and it is now pending trial. The arbitrators, in order to try the case *de novo*, admitted it to a review and issued a notice to the parties calling upon them to put in their evidence on 15th November 1875; but for want of attention on the part of the arbitrators the suit is still pending trial, and up to this time no final order has been passed by the arbitrators. Under such circumstances, the petitioners have no right whatever to get the decision confirmed which has been reversed by the arbitrators." In this state of the facts the Moonsiff appears to have considered, not that the arbitrators were incompetent to re-hear the matter in arbitration, but that a final and conclusive order, rejecting the application for re-hearing, had been made by two of the arbitrators. He also cursorily remarked upon the insufficiency of the stamp on which the petition of review was filed before the arbitrators. I should have thought that no stamp was required. He also thought that, according to the provisions of section 378 of Act VIII of 1859, the order in rejection of the review is final. It seems to me clear that that could not possibly be a ground of judgment in this case. The Moonsiff further said: "For rejecting the petition the concurrence of opinion of two arbitrators is sufficient. There is now no bar to the enforcement of the said award." He, therefore, ordered the award to be filed and gave a decree for the plaintiff as to the said award being valid and correct.

On appeal the District Judge held that the view taken by the Moonsiff was erroneous. He considered that the order striking off the case was not the act of the whole of the arbitrators, and that by the very fact of their having admitted the case to be re-heard they tacitly expressed a doubt as to the justice of their first award; and that until the question was again considered, their first award could not be looked upon as final. The Judge, therefore, thought it unadvisable to give such an award the force of a decree, and he therefore reversed the decision of the Moonsiff.

It has been contended before us in special appeal that the lower Appellate Court had no jurisdiction to make this order, inasmuch as the Moonsiff having made a decree in accordance with an award of arbitrators, that decree was by law final, and Baboo Mohesh Chunder Chowdhry referred us to a case in 21

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JACKSON, J.

W. R., 248—*Sreenauth Chatterjea vs. Koylash Chunder Chatterjea*, in which judgment was given by the late Chief Justice, Sir RICHARD COUCH, of which the head-note is to the effect that section 327 of the old Code of Civil Procedure “incorporates the provision in section 325 as to the finality of the judgment given according to the award, and puts the award filed under section 327 in the same position as the award filed under section 325. Where a Court files an arbitration award and passes a decree, that decree is final.” The question to be considered here was very fully considered by the Full Bench in a case reported in 15 W. R., 9 F. B.; 8 B. L. R., 315—*Lalla Ishuree Pershad vs. Hur Bhurjun Tewaree*. It is not very easy to ascertain what was the decision of the Full Bench in that case, because separate judgments were given which did not all agree, but the opinion of the late Mr. Justice NORMAN, who was then acting as the Chief Justice, in which opinion I concurred, was this : That where there has been an award and the decree passed by the Court below is in accordance with that award, that judgment is final ; but where it can be shown that there was not in fact any award on which a judgment could be based, there is no final decree and an appeal would lie. In this case the defendant had to show cause against the finality of the award, and he did show what appears to me to be a very satisfactory cause. He showed that the arbitrators, after making the award, and after an interval of only a very few days, had expressed a doubt as to the correctness of the award by intimating their readiness to re-consider their decision. It may be observed that the award was not one of the whole number of arbitrators, but of four out of five ; and, even if we assume that in the reference to arbitration provision was made that in case of difference of opinion the decision should rest with the majority, still the fact that one of the number had dissented ought to be taken into account when it is seen that the remaining arbitrators expressed a readiness to reconsider their decision. It may very well be that, but for the death of one of these four, and what took place consequently, there might have been a further award by the same arbitrators in which the conclusion would have been different from that arrived at on the 27th August. It was never, I think, the intention of the Act that the Court should bind

parties by the result of a private arbitration when the arbitrators themselves plainly showed that they doubted the correctness of their decision. That, it appears to me, was an extremely strong and valid objection to the finality of the award—one which tended to show that the award was no valid award; and therefore it was a matter which the lower Appellate Court could consider on appeal. I think, therefore, the Judge of the Court below was not in error in the decision which he arrived at in this case, and that this appeal ought to be dismissed with costs.

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## [CIVIL APPELLATE JURISDICTION.]

1878  
January 18.

UMA CHURN SEN AND ANOTHER . PLAINTIFFS ;

AND

GOBIND CHUNDER MOZUMDAR }  
AND OTHERS . . . . . } DEFENDANTS.*Notification of Sale—Sale Certificate.—Sale under Act VIII of 1859, section 249, in execution of a decree for arrears of rent.*

Where on an execution sale there is a discrepancy between the conditions in the notification of what is to be sold, and the certificate of what has been sold, the conditions in the notification are to be taken as of superior authority, in dealing with the conflicting claims of innocent third parties whose rights are affected by the variation.

In execution of a decree for arrears of rent, an application was made for a sale of the tenure for the arrears of which the decree had been obtained. A notification was issued purporting to be a sale proclamation under Act VIII of 1859, section 249, and in pursuance of that notification the sale of the right, title and interest of the judgment-debtor took place: *Held*, that the tenure did not pass by that sale, notwithstanding that the sale certificate stated it was the tenure itself which had been sold.

**S**PECIAL APPEAL from a decree passed by the Officiating Judge of Furridpur, reversing that of the Subordinate Judge of that district.

This was a suit to cancel an inferior tenure, plaintiff alleging that he had bought the superior tenure at an auction sale for arrears of rent, on the 30th of August 1873. It was on this allegation the case turned. The superior (dar-mourosi) tenure was sold for arrears of rent on the date just mentioned, but the notification of sale declared that only the right, title and interest of the judgment-debtor would be sold, though the sale certificate stated it was the tenure that was sold.

The Subordinate Judge held that the tenure itself was sold, on the ground that the clause as to "the right, title and interest of the judgment-debtor" had crept into the notification by mistake ; and that where a tenure is sold in execution of a decree for rent, the tenure itself passes, and not merely the right, title and interest

of the judgment-debtor. This decision was reversed, on appeal, by the Officiating Judge, who stated :—

“ I find that the sale notification issued as a preliminary to the sale is to the effect that the rights of the judgment-debtors would be sold. The lower Court has held that the word *हक* may have crept in by mistake on the part of the Moonsiff's amla. Even supposing it was a mistake, I do not see that that makes any difference. But I think the presumption is that there was no mistake. Under the head of ‘conditions of sale’ it is said in the notification that nothing but the right, title and interest of the judgment-debtors will be sold. It is beside the point to argue, as has been done by the Subordinate Judge, that the sale certificate explains the notification. The important point is to consider what was before the public—more particularly what was before the holders of the *se-mourosi* tenure. Here was a notification that certain rights were to be sold. The sale of these rights would not affect their interests. From the evidence produced by plaintiffs, I see that they were present at the sale to watch after their own interests, and there was some talk of their paying the arrear, but they did not do so. No doubt they were advised that there was no need to do so ; and I think they were rightly advised. It is of no use to refer to the decree-holder's application or to the sale certificate. We cannot look beyond the four corners of the notification.” Plaintiff then brought this special appeal.

Baboo *Mohiny Mohun Roy*, and Baboo *Grija Sunker Mozumdar*, for the Appellants.

Baboo *Sree Nath Das*, and Baboo *Shashi Bhusun Dutt*, for Respondents.

The judgment of the Court (1) is as follows :—

The plaintiffs are the special appellants in this case. They sued for direct possession of a *se-mourosi* tenure in the possession of the defendant, on the allegation that they, the plaintiffs, had purchased the superior tenure at an auction sale for arrears of rent, and that, therefore, they were entitled to recover possession

(1) KEMP and MORRIS, J.J.

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*Judgment.*

of that tenure free from all incumbrances; that they had issued a notice, on the 13th of March 1874, to the defendants to quit possession; and that the defendants not having done so, their cause of action arose from the date of service of such notice. The defendants amongst many other objections took this main objection that the auction-purchasers purchased only the right, title and interest of the defaulter and not the tenure itself. That was the main issue upon which the parties went to trial, and upon which the First Court based its finding. That Court truly says that the point for decision is, whether the purchase conveyed the tenure to the plaintiffs free from incumbrances, or whether they have acquired only the rights and interests of the defaulters; and the Subordinate Judge was of opinion, for the reasons given in his judgment, that the tenure itself passed, and therefore the plaintiffs had proved their case and were entitled to decree.

On appeal the Officiating Judge of Furridpur has reversed the decision of the First Court. He holds that the plaintiffs are the purchasers, at an auction sale, as they allege, of a dar-mouroosi tenure; and the question therefore was, whether they had purchased only the right, title and interest of the former dar-mouroosi holder, or whether they had purchased the dar-mouroosi tenure itself. In the latter case, the Judge says they would have purchased free from incumbrances and could void under-tenures; in the former case they could not do so. The Judge found that the sale notification issued as a preliminary to the sale is to the effect that the rights of the judgment-debtors would be sold; that the lower Court had presumed that the word हक (hak) had crept in by a mistake on the part of the Moonsiff's amlah, "but even supposing it was a mistake," says the Judge, "I do not see that that makes any difference; but I think the presumption is that there was really no mistake." The Judge goes on to observe that, under the head of conditions of sale, it is stated in the notification that nothing but the right, title and interest of the judgment-debtors would be sold. He, therefore, reversed the decision of the First Court. The plaintiffs now appeal specially to this Court. They have urged that the sale certificate shows that the entire tenure and not the right, title and interest only of the defaulter was sold at that sale, and that the lower Appellate

Court was wrong in holding otherwise. On referring to the papers on the record of the case we find that the sale notification was headed thus : " A sale proclamation under section 249 of Act VIII of 1859 ;" and it is there stated that whatever right the judgment-debtors may have in the property specified therein will be sold, and the first condition of sale is to the effect that nothing will pass under this sale beyond the right, title and interest of the judgment-debtors. Under section 59, Act VIII (B.C.) of 1869, whenever a decree is passed for arrears of rent due in respect of an under-tenure which by the title deeds or the custom of the country is transferable by sale, and the judgment-creditor shall make application for the attachment and sale of such under-tenure, the Court shall, so soon as such under-tenure shall have been ordered to be sold, cause to be hung up in some conspicuous part of the building in which such Court sits, and of the building in which the Collector and Judge of the district within which the land comprised in such under-tenure is situate, and to be affixed on some conspicuous place on the land itself, and on some conspicuous place in the town or village in or nearest to which such land is situate, a notice for the sale of such under-tenure on some fixed date. Therefore, in execution of a decree for arrears of rent in respect of under-tenures which, by the title deeds or by the custom of the country, are transferable by sale, it is necessary for the Court to issue a notice for the sale of such under-tenures. Now the notice which was issued in this case was not a notice for the sale of an under-tenure, but was a notice confining the sale to the right, title and interest of the defaulting proprietor. We therefore think, looking to the circumstances of this case alone, and without reference to the precedents quoted by the pleader for the appellant, the facts of which are not sufficiently apparent from the decision, that the Judge's view is a correct one. We may add, moreover, that a third party purchaser is not and cannot be guided by the sale certificate, but by the notification of sale. This furnishes an index to him of what it is the Court proposes to sell, and enables him to determine whether he shall purchase or not, or otherwise interfere to prevent the sale. The special appeal is dismissed with costs.

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 AND OTHERS.

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 —

[CIVIL APPELLATE JURISDICTION.]

1878
January 24.

SREEMUTTY BIDHOOMOOKHI DEBI . . . DEFENDANT;
AND
RAJA NILMONY SINGH DEO PLAINTIFF.

*Arrears of Rent—Patni Talook—Amaldastak—Regulation VIII of
1819, sections 7, 15.*

If, by reason of the patnidar's not giving security, the zemindar withholds his *amaldastak*, and also abstains from availing himself of the power which the law gives him of collecting the rents himself, it would be inequitable to allow him to recover from the patnidar the rent which the withholding of the *amaldastak* has prevented his collecting.

SPECIAL APPEAL from a decree passed by the Judicial Commissioner of Chota Nagpore, affirming that of the Deputy Commissioner of Manbhoom.

This was a suit for the second kist of rent for 1280, of a patni talook, amounting to Rs. 586-14 with interest. The defendant had bought the tenure at an auction sale for arrears of rent, but finding the rent too heavy had declined to give security. Plaintiff refused to grant an *amaldastak*, and did not appoint a *sazawal* to collect the rents.

Baboo *Rash Behary Ghose*, for Appellant.

Baboo *Bhowany Churn Dutt*, for Respondent.

The judgment of the Court (1) was delivered by

JACKSON, J. JACKSON, J. :—

The plaintiff in this case sued to recover Rs. 639, being the arrears of patni rent, under the following circumstances :—The former patnidar having committed default, the patni was sold under Regulation VIII of 1819, and purchased by the defendant, who, according to the plaint, is in possession and enjoyment thereof, and who not having paid the arrears due, the present suit is brought. The plaintiff in the first instance obtained an

(1) JACKSON and McDONELL, J.J.

ex-parte decree, but on application the defendant was allowed to put in her defence, and she represented that in consequence of her failure to give security, the plaintiff had attached the mehal and had himself collected the rent, and consequently the defendant was not liable. The defendant also applied for a summons against the plaintiff to attend and give evidence, with a view to establishing her allegation.

Both the Courts appear to concur in finding that the defendant having failed to give security, the plaintiff refused to grant her an *amaldastak*; and that the plaintiff did not, as under the law he might have done, appoint a *krok-sazawal*; but they were both of opinion that the appointment of such *krok-sazawal* was optional with the zemindar, and that the defendant was fully liable notwithstanding that she had not got her *amaldastak*.

Now, it is stated by the Court of First Instance, and the Appellate Court appears to be of the same opinion, that the zemindar, although empowered by law in such circumstances to appoint a *krok-sazawal*, is not bound to do so, and, as the Judicial Commissioner puts it, "the plea that the plaintiff refused to put her in possession is futile; defendant admits that she failed to furnish the security demanded by the zemindar, so that it is her own fault if she got no *amaldastak* from him." No doubt, the law enables and does not expressly direct the zemindar to appoint a *krok-sazawal*; but it is also optional with the zemindar to demand or dispense with the security. It does not follow that in every case security is to be demanded; and it appears to us that it would be highly inequitable if a zemindar were at liberty to withhold his *amaldastak*, and so disable the patnidar from collecting his rents by reason of security not being given, and then to abstain from using that power which the law gives him for collecting the rent himself and to follow up that course of conduct by suing the defendant for the rent which she has thus been debarred from collecting. In this view of the case, and in the absence of any thing to show that the defendant has, notwithstanding the zemindar's refusal to grant her an *amaldastak*, been able to collect any rent, we think the plaintiff's suit ought to have been dismissed. We therefore allow the appeal, and reverse the decisions of the Courts below with costs.

1878
SREEMUTTY
BIDHOO-
MOOKHI DEBI
v.
RAJA
NILMONT
SINGH DEO.
Judgment.
JACKSON, J.

[CIVIL APPELLATE JURISDICTION.]

1878
January 25.

SATYA MONI DASSI PLAINTIFF;
 AND
 BHÜGGOBUTTY CHURN CHATTOPADHYA } DEFENDANTS.
 AND OTHERS }

Notice of Title—Constructive Notice—Onus.

A and B were co-sharers. B leased his share to D, taking rent separately from him; and A sold his share to C, so that B and C became co-sharers. Afterwards B conveyed his share to E and delivered D's kabuliati to him, the conveyance, which was registered, reciting payment of the consideration. Subsequently E sold the share to C for valuable consideration. In a suit brought by C for possession, B alleged that his conveyance to E was a *benami* transaction, of which C was cognizant. *Held*, that the onus of showing that was on B; and that, *prima facie*, C was justified in supposing that E had a good title to convey.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of the Twenty-four Pergunnahs, affirming that of the Moonsiff of that district.

Baboo *Opendro Chunder Bose*, and Baboo *Mohendro Nath Nag*, for Appellant.

Baboo *Kishen Komul Bhattacharjya*, for Respondents.

The facts are sufficiently set forth in the judgment of the Court (1), which is as follows:—

The plaintiff is the special appellant in this case. It appears that the plaintiff is the purchaser of a 10 annas, 13 gundas, 1 cowry, 1 krant share in this property. He purchased on the 13th of Bysack 1280 (24th of April 1873), from Mohanunda Bhattacharjee, and there is no dispute or question as to this purchase. The other co-sharer in the estate was Preonath Chuckerbutty, the second defendant in this case. His share represented a 5 annas, 6 gundas, 2 cowries, and 2 krant share, and that share was leased to Bhuggobutty Churn Chattopadhyia on the 13th Bysack 1278 (25th of April 1871). On the 14th of Pous

(1) KEMP and MORRIS, J.J.

of the same year (28th of December 1871), Preonath sold his 5 annas, 6 gundas, 2 cowries, 2 krant share to Bane Madhub for the sum of Rs. 200; and on the 26th of Bhadro 1278 (10th of September 1871), Bane Madhub sold to the plaintiff that share for Rs. 450. The plaint recites that Bane Madhub delivered possession to his vendee, the plaintiff, in the presence of Bhuggobutty, the tenant. Subsequently the plaintiff sued Bhuggobutty for rent from Bhadro 1280 to Assin 1281 (September 1873 to October 1874). That suit was dismissed. Bhuggobutty pleaded in that rent suit that he was not the tenant of the plaintiff, but that he was the tenant of Preonath, and on that ground the rent-suit was dismissed. This forced the plaintiff into the Civil Court to prove his title. Preonath Chuckerbutty, the second defendant, states that the allegation of the plaintiff, that he, Preonath, sold his 5 annas, 6 gundas, 2 cowries and 2 krant share to Bane Madhub is false. Then he sets out what he states to be the real circumstances of the case, namely, that he was left a minor in 1277, (1870-71), and that, as he had no relatives, his brother, on his death-bed, begged Bane Madhub and Shibkedar Bundopadhyaya to take charge of him (Preonath) and his property; that subsequently he was persuaded by Bane Madhub, whom he alleges to have been his guardian, to make a *benami* sale of this property in Bane Madhub's favour, Bane Madhub having represented to him that the estate was indebted; that no consideration passed from Bane Madhub to him, Preonath; and that the kabuliati of Bhuggobutty Churn, which was made over by Bane Madhub to the plaintiff, was in the hands of Bane Madhub in his capacity of guardian of Preonath; and that it was his, Preonath's, intention to sue Bane Madhub for the papers in his possession, and also for a *nikas*. The vendor Bane Madhub, the third defendant, admits the plaintiff's claim; he admits the sale to him and the receipt of consideration, and says that he has been improperly made a party to this suit. The first defendant, Bhuggobutty Churn Chattopadhyaya, states that he took the lease from Preonath, and that he has paid rent to him and not to Bane Madhub; that he has no permanent right or interest in the disputed land; that he is simply a lessee for a period of ten years, and he therefore prays that he may be exonerated from costs.

1878
SATYA MONI
DASSI
v.
BHUGGO-
BUTTY CHURN
CHATTOPA-
DHYA AND
OTHERS.

Judgment.

1878
 SATYA MONI
 DASSI
 v.
 BHUGGO-
 BUTTY CHURN
 CHATTOPA-
 DHYA AND
 OTHERS.

—
Judgment.
 —

Both Courts have dismissed the plaintiff's claim. The Subordinate Judge, with reference to the plea of minority which was urged in the Court below, observes that he cannot say that there is any evidence to show that Preonath was below 18 years of age when he executed the conveyance to Banee Madhub. Then, with reference to the question whether the consideration passed, the Subordinate Judge was of opinion that no consideration passed, and that Preonath sold the property in suit to Banee Madhub in the belief that there were creditors, and that by making this *benami* transfer he would save the property from the claims of those creditors. With reference to the question of notice, which is an important question in this case, the Subordinate Judge, after quoting Smith's Manual of Equity Jurisprudence, and Mr. Justice MARKBY's lectures on Indian Law, was of opinion that the plaintiff had constructive notice; and that, if he had made such enquiries as a prudent man ought to have made, he would have discovered that Bhuggobutty Churn was paying rent to Preonath and not to his vendor, Banee Madhub; and, therefore, that the transaction between Preonath and Banee Madhub was a *benami* transaction, and that the beneficial owner of the property was not Banee Madhub, but Preonath.

The points we have to consider in this special appeal are : (1) the question of minority; (2) the question of consideration; and (3) the question of notice. On the first question, viz., of minority, there is a clear finding, on the part of the Subordinate Judge, that there is no evidence to show that Preonath was not of full age when he executed the conveyance to Banee Madhub; and that conveyance, we may observe, is registered. We must, therefore, hold that Preonath was of age at the time of the execution of the conveyance, and that he cannot plead minority or avoid the responsibility of his own act. Then, with reference to the question of consideration, the kobala in both instances, namely, the kobala from Preonath to Banee Madhub, and the kobala from Banee Madhub to the plaintiff, are registered; and there is a recital in each of them that the consideration was paid. The plaintiff has solemnly affirmed the truth of the recital in respect of payment by himself, and his vendor Banee Madhub has acknowledged receipt of the money. The onus, therefore, of proving that no

consideration passed, was on Preonath, and this onus he has failed to discharge, for he has given no rebutting evidence whatsoever. Then, with reference to the question of notice, we observe that Preonath has given no proof of this transaction between him and Bane Madhub, being a mere paper transaction. So far from the plaintiff having reason to suppose that the title and possession in the land remained in Preonath, the conclusion forced upon him was quite the contrary; for he saw that the kabuliat of the lessee, Bhuggobutty, was in Bane Madhub's hands, and this kabuliat Bane Madhub made over to him. Nor was his previous possession as a two-third sharer in the estate likely to assist him in this matter. The Subordinate Judge relies very much on the fact of the plaintiff being a co-sharer, representing a two-third share in the estate, to show that he must have been aware that Bhuggobutty was paying rent, not to his vendor, Bane Madhub, but to Preonath. But this is not the case, for Bhuggobutty Churn himself in his written statement admits that the rents were realized separately, and that he entered into a distinct contract of lease with Preonath in respect of his 5 annas, 6 gundas, 2 cowries, and 2 krant share.

Under these circumstances, we are of opinion that the plaintiff had good reason for supposing that the conveyance by Preonath was a *bona fide* one, and was not bound to enquire further. We, therefore, think that on the two latter points, namely, the question of consideration and the question of notice, the decision of the Subordinate Judge was wrong in law. Accordingly, we reverse it, and decree this appeal and the plaintiff's suit with costs.

1878
SATYA MONT
DASSI
v.
BHUGGO-
BUTTY CHURN
CHATTOPA-
DHYA AND
OTHERS.
—
Judgment.
—

[CIVIL APPELLATE JURISDICTION.]

1877
August 23.

CHUNDER KANT MOOKERJEA DEFENDANT;

AND

1878
January 31.

JUDOO NATH KHAN AND ANOTHER . . . PLAINTIFFS.

Small Cause Court—Costs—Tender before action brought.

A demanded Rs. 1,300 as one sum due to him from B, and B tendered Rs. 1,000 to A, saying that was all he owed him. On action brought, a decree was given to A for the Rs. 1,300, and it was held that A was entitled to full costs; he not having been under any obligation to accept the Rs. 1,000 and sue for the remaining Rs. 300 in the Small Cause Court.

An offer to pay a portion of a debt in discharge of the whole is not a legal tender of part only.

James vs. Vane, 29 Law Jour. Q. B., 169; *Grosse vs. Seaman*, 11 C. B., 524; *Dizon vs. Clarke*, 5 C. B., 365, discussed.

APPEAL from a decree passed by Mr. Justice KENNEDY, in the Original Civil Jurisdiction of the High Court.

This was a suit for Rs. 1,323-15-6, the price of goods sold and delivered to the defendant. Before the plaint was filed, plaintiffs' attorneys wrote to defendant's attorneys, demanding payment of the Rs. 1,323-15-6, to which they replied:—

“With reference to your letter of the 29th instant, which I referred to my client, in reply he instructs me to state that there is only due to your clients in respect of the ginger sold by them to him the sum of Rs. 1,043-5, which said amount I hereby tender to you.”

The plaintiffs refused to accept the amount tendered, and the defendant in his written statement (and at the hearing) submitted that “inasmuch as such tender, if accepted, would have left only Rs. 280-10-6 in dispute, the plaintiffs should have accepted the tender and sued for any further sum in the Calcutta Court of Small Causes which had jurisdiction in that behalf, and the defendant submits that, if the plaintiffs succeed at all in establishing a claim to more than the sum tendered, the defendant should

have awarded to him any costs which he is put to by reason of the action being brought in this Honourable Court."

J. D. Bell and Allen, for the Plaintiffs.

Bonnerjee and Palit, for the Defendant.

The case came on for hearing before KENNEDY, J., who gave plaintiff a decree for the amount which he claimed. The following is the judgment of the learned Judge on the question of costs:—

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CHUNDER
KANT
MOOKERJEE
v.
JUDOO NATH
KHAN.
Judgment.

KENNEDY, J. :—

KENNEDY, J.

I do not think that, looking at the terms of the Small Cause Courts Acts, this is a case in which this Court should exercise its discretion. The provisions in Act XXVI of 1864, section 9, are very peculiar, and only give a right to certify that the action was a fit one to be brought in the Supreme Court, by reason of the difficulty, novelty or general importance of the case, or of some erroneous course of decisions in like cases in the Court of Small Causes. Now, I cannot say that this case is a novel one; it is not one in which there is any difficulty, nor is it of general importance. It seemed to me a tolerably plain case on the evidence. I must, therefore, consider whether the case, cited by Mr. Bell, of *James vs. Vane* (29 Law Journal, Q. B., 169) governs the present case. Now that case was very much determined, as far as I can see, on the construction of rules of that Court, which are not applicable here. But COCKBURN, C.J., expressly rested his decision on this, that there was a distinction between a case where one inseparable claim was made and a case where the amount was made up of several separable items, and held that the case came under the latter class of cases.

He says: "Where a plaintiff claims an amount, which is the result of one demand, and which cannot be separated, he may say to the defendant, when a smaller sum is tendered to him, I will not take less than the whole sum which I claim; but where the whole demand is made up of an aggregate of items, and the defendant comes and says I acknowledge that I owe you so much, and there is your money for you, the plaintiff is wrong if he refuses to take it, and, *quoad* that amount, he ought not to be allowed to keep the claim alive in its entirety for the purpose of

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 KANT
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 KHAN.
 —
Judgment.
 —
 KENNEDY, J.

suing the defendant upon it in the Superior Court, so as to get costs upon the higher scale." In that case one demand was for £24-8-10 and the other for £4-10-6, and the tender was £26-10-6, a sum more than sufficient to cover the larger of the two demands. In this case there was nothing of that kind. The tender was made in respect of a single claim above the amount of Rs. 1,000, and therefore I think that, according to the principle on which COCKBURN, C.J., goes, *James vs. Vane* is not applicable. I may also mention the case of *Crosse vs. Seaman* (11 C. B., 524), in which the Court of Common Pleas decided that a tender and payment into Court which reduced the claim to a sum less than £20 did not bring it within the County Courts' Act, so as to preclude the plaintiff from getting his costs. I may further observe that, in the case of *Dixon vs. Clarke* (5 C. B., 365), which was cited in the case of *James vs. Vane* (29 Law Jour., Q. B., 169), it is expressly ruled, and the principle is adopted by COCKBURN, C.J., in *James vs. Vane*, that a tender of part of an entire debt is bad. I think, therefore, in this case that the tender of part of the claim cannot enable the defendant to throw on the plaintiff the certainty of losing his costs if he proceeds in the tribunal where he thinks he is most likely to succeed. The plaintiff will have his costs.

The defendant appealed on the whole case, but the appeal was dismissed with costs. On the question of costs, the judgment of the Court (1) is as follows:—

GARTH, C.J. GARTH, C.J. :—

As regards the last point urged upon us, which only affects the question of costs, we think that the tender of the Rs. 1043-5-0 was made in such a way that the plaintiff could not accept the sum tendered, without giving up the remainder of his claim. An offer of that kind to pay a portion of the debt in discharge of the whole, is not a legal tender of the part only; and this case therefore does not come within the principle of the authorities which have been cited to us by Mr. Bell. If the money had been tendered unconditionally, it might have been otherwise. The appeal is dismissed with costs.

(1) GARTH, C.J., and MARKBY, J.

[CIVIL APPELLATE JURISDICTION.]

AHOLLYA BAI DEBIA PLAINTIFF ;
 AND
 SHAMA CHURN BOSE DEFENDANT.

1878
 January 25.

*Suit for Possession after Foreclosure—Valuation—Court Fees' Act, 1870,
 section 7, clause 9.*

Where a suit for possession is brought after a decree for foreclosure has been obtained, the valuation of such a suit, in so far as the jurisdiction of the Court is concerned, is not to be calculated according to the scale laid down in the Court Fees' Act, section 7, clause 9.

SPECIAL APPEAL from a decree passed by the Judge of Nuddea, affirming that of the Subordinate Judge of that district.

This was a suit for recovery of possession of a darpatni talook after foreclosure of a conditional sale under a *khatkobala* of the 13th of Kartick 1275 (28th of October 1868). The suit was brought in the Subordinate Judge's Court, being valued at Rs. 3,010-5. The Subordinate Judge dismissed it on the grounds (1) that the suit should have been valued under the provisions of clause 9, section 7, of the Court Fees' Act, 1870; (2) that the value, as was apparent from the mortgage bond, was really only Rs. 800, and the suit should therefore have been brought in the Moonsiff's Court. Plaintiff appealed, and his appeal was dismissed. He then preferred this special appeal.

Baboo *Mohiny Mohun Roy* and Baboo *Bipro Doss Mookerjee*, for Appellant.

Baboo *Bhubun Mohun Dass*, for Respondent.

The judgment of the Court (1) is as follows :—

The plaintiff is the special appellant in this case. The suit was for possession, after foreclosure of a mortgage dated the 13th of Kartick 1275 (28th of October 1868). That mortgage was foreclosed on the 4th of Joysto 1278 (17th of May 1871). The

(1) KEMP and MORRIS, J.J.

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 —
Judgment.
 —

present suit is brought on the 22nd of July 1874, and is valued at Rs. 3,010-5, being fifteen times the annual profits of the darpatni, the possession of which is claimed. Both the Courts have found that the suit must be dismissed, because the valuation of such a suit is absolutely fixed by section 7, clause 9, of the Court Fees' Act, 1870. Now that clause of that section says that, in suits by a mortgagee to foreclose a mortgage, the valuation must be "according to the *principal money* expressed to be secured by the instrument of mortgage." Now this suit is not for foreclosure. It is a suit for possession brought after foreclosure; and it has been frequently held by this Court (1) that the valuation of such a suit, in so far as the jurisdiction of the Court is concerned, is not to be calculated according to the scale laid down in the Court Fees' Act.

We, therefore, think that both Courts have proceeded on a wrong principle; and we accordingly remand the case for trial upon the other issues. Costs to follow the result.

(1) See *Jeebraj Singh vs. Inderjeet Mahton*, 18 W. R., 109; *Nauhoon Singh vs. Toofanee Singh*, 20 W. R., 33; 12 B. L. R., 113; *Ohunder Nath Bhuttacharjea vs. Brindabun Shaha*, 25 W. R., 39.

[CIVIL APPELLATE JURISDICTION.]

SURDHAREE LALL DECREE-HOLDER;
 AND
 GIRINDUR CHUNDER GHOSE . . . JUDGMENT-DEBTOR.

1877
 December 20.

Mesne Profits—Execution Case struck off for Default—Limitation.

Where a party obtains a decree for possession and mesne profits, under which he obtains possession but fails to prosecute his suit for mesne profits, and the execution case is struck off for default: *Held*, that it is very doubtful if, in any case, the effect of such an order would be to prevent the decree-holder again applying for execution of that portion of the decree relating to mesne profits, so long as he keeps within the provisions of the Limitation Act. It is otherwise under section 230, Act X of 1877.

SPECIAL APPEAL from an order passed by the Judge of Bhaugulpore, affirming that of the First Subordinate Judge of that district.

In this case the plaintiff got a decree for possession and mesne profits of certain land on the 10th of September 1873, and was put into possession on the 9th of April 1874. At the same time the Ameen was deputed to make investigations with respect to mesne profits, but neither party adduced any evidence, and the case was struck off for default. On the 3rd of May 1876, the present application was made for execution of that portion of the decree relating to the mesne profits. The application was dismissed by the Subordinate Judge, whose order was upheld by the District Judge. The decree-holder then brought this special appeal, on the ground (1) that there was no default on his part, as the opposite party was bound to give evidence and not he; and (2) that the execution of the decree, not being barred by limitation, the orders of the lower Courts were illegal, and could not be allowed to stand.

Baboo *Doorga Mohun Dass*, for Appellant.

Baboo *Prannath Pundit*, for Respondent.

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GHOSE.

Judgment.
—

The judgment of the Court (1) is as follows :—

It appears to us that the Court below was wrong in saying that the Subordinate Judge's order of 1874 was virtually one extinguishing the decree for mesne profits. As far as we can discover from the terms of the proceeding in question, and also from the circumstances then before that Court, all that the Subordinate Judge meant to say by that order was to strike off the file the execution proceedings then pending. We can discover nothing like an order extinguishing the decree for mesne profits, nor, as it appears to us, could the Subordinate Judge have made such an order. There are, no doubt, observations contained in two judgments, delivered by Mr. Justice PHEAR in 21 Weekly Reporter, (2) which seem to countenance the idea that the Civil Courts had powers of that kind, but I am very doubtful whether the Court could deprive an execution-creditor of his rights under a decree, because he had not acted with what appeared to the Judge sufficient diligence, so long as the creditor kept within the terms of the law. The present Code of Civil Procedure contains a provision (3) upon that subject which may be found, I hope, to work satisfactorily for the prevention of such dilatory proceedings. Whether the Courts were empowered so to act or not, it appears to us that the Subordinate Judge had not the intention of making any such order, and therefore as the present application is not barred by limitation, we think the order ought to have been made transferring the decree for execution in respect of mesne profits to the proper Court in the Sonthal Pergunnahs. The appeal is allowed with costs.

(1) JACKSON and McDONELL, J.J.

(2) *Musst. Binda Behee vs. Lalla Gopenath*, 21 W. R. 66.

(3) See Act X of 1877, section 230, para. 3.

NOTE.—In another case, Special Appeal No. 199 of 1877, where the application was refused in the lower Courts on account of the decree-holder's failure to produce evidence as to what the land did yield, as well as what it was capable of yielding, the High Court (JACKSON and McDONELL, J.J.) said: "The decision of this case proceeds altogether upon a mistaken notion of what the duties of the plaintiff and of the defendant are in such cases. The decree-holder, who has been out of possession, makes his claim for *wasilat*, which he must do necessarily by estimate. He, not having been in possession of the land, has no means of proving what crops had been grown or what profits had been

received. Upon his making his claim, it lies upon the judgment-debtor who had been in possession to adduce his accounts and papers, and prove to the satisfaction of the Court that the amount claimed by the plaintiff is in excess of the proper amount. If he fails to prove that, the plaintiff ought generally to have what he claims, if the claim be fairly reasonable. The orders of both the Courts below are set aside with costs.

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Judgment.

[CRIMINAL REFERENCE.]

1878
January 17.

IN THE MATTER OF RAM MANIKYA CHUCKROBURY
AND OTHERS.

Code of Criminal Procedure, section 453—Joinder of charges—Several offences committed.

Section 453 of the Code of Criminal Procedure is not to be construed as meaning that, no matter how many offences of the same kind a man may commit within one year, he may not be prosecuted for more than three. He may be separately tried for other offences.

THIS was a reference from the Sessions Judge of Noakhally. The facts are set forth in his report, which is as follows :—

“Ram Manikya Chuckrobury, Goluck Chowkeedar, and five others petitioned under section 295 of the Code of Criminal Procedure, on the ground of illegality and irregularities in their trials. The conviction arose out of the following circumstance :—Last *Churuk Puja* the villagers of Bassura (in Chagulnya Thanna) got up a mock swinging performance, the swingers being stained with pigeon’s blood and the hook not passing through the flesh. The Police stopped it and a *melée* ensued, and the Police got assaulted.

“Subsequently the Sub-divisional Magistrate, Baboo Saroda Prosad Sarkar, with 2nd class powers, himself went out and investigated the case. The record shows, there was some misconduct on the part of the Police, but this Court has no other cognizance of it, and no further reference to it is needed. Many persons were accused of attacking the Police, and it transpired subsequently that money had been given freely to escape implication.

“The petitioners were charged with extorting bribes from the villagers through threats of being chalanned. The Deputy Magistrate had this matter investigated likewise and ten cases were sent up as proven. In eight thereof Ram Manikya was sentenced and in five Goluck, for taking sums from the country people. The former is what is called a “toorney,” that is, an unlicensed village mooktear.

"They appealed to the District Magistrate unsuccessfully. They then petitioned this Court to call for the records. This was before the vacation, but by the formal request of petitioners' vakeels the hearing was adjourned till after the Pujas, as the pleaders went to their homes. As this Court has nothing to do with the merits of the case, but it is its province under Chapter XII only to look to regularity and legality or otherwise of the proceedings, I need only say that it cannot be said there is no evidence, nay that the evidence is sufficient. Hence no reference is called for on the ground of no evidence, which, it has been ruled, comes under 'irregularity.'

"Next, as to the legality or regularity in other respects. In the grounds for this petition many objections are urged; but at the hearing they on analysis vanish and are abandoned, except these two: (1) That the convictions in excess of three are illegal and contrary to section 453 of the Code of Criminal Procedure; and (2) that the Deputy Magistrate was personally interested on account of the damage suit against him. The second it will be convenient to discuss first.

"In the course of the trial a suit was filed on 15th of June against the Deputy Magistrate by Ram Manikya for Rs. 200 in the Civil Court, on the allegation that the Deputy Magistrate had used abusive language to the accused by calling him a *Badzad*. On 16th of June, the very next day, application was made by accused to the Deputy Magistrate to transfer the case elsewhere, on the ground that he (accused) had filed that suit. This was refused, and repeated also unsuccessfully before the District Magistrate. [It may be mentioned incidentally that the damage suit resulted in an award of Rs. 10 damage, without costs to the criminally accused (the civil plaintiff) and the Civil Court found the defendant, the Deputy Magistrate, had used the expression, and was of course wrong in so doing, but that the plaintiff had, by his own conduct in trying to conceal himself behind his fellow prisoners from an identifying witness, given rise to the language.]

"Now, as the alleged interest in the criminal case was no antecedent interest, and as it would be obviously very undesirable that a criminal accused should, by filing a civil suit during the pendency of his criminal case, procure a fresh trial, I hold

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Judgment.

the criminal trial was not vitiated; and I note further, that the District Magistrate directed the Deputy Magistrate to retain and finish the case.

"The other ground for this motion, however, that the convictions are illegal in view of section 453 must be held fatal. These convicts have been sentenced for eight and five extortionate acts, respectively, occurring about the same date. The acts are of the same kind, nay the very same, viz., extortion; and the prisoners have been charged and tried at the same time (viz., 31st of July, and 1st and 3rd of August). It cannot be doubted that if they had committed one hundred acts of extortion within one year of each other they would be liable to be charged and tried at the same time for three only.

"The Deputy Magistrate's explanation is annexed, but it appears to this Court he mistakes the law. He has—his sentences show—only had in view section 314, convictions "at one trial." The punishments aggregate a few days short of double his powers."

The judgment of High Court (1) is as follows:—

We see no grounds for interfering. Section 453 of the Criminal Procedure Code modifies section 452, which requires a separate charge and a separate trial for every distinct offence, by allowing three charges of three distinct offences of the same kind and committed within one year of each other to be tried at the same time. But this does not mean that, if at one time or within one year a man commits fifty distinct offences of the same kind, he shall not in one day be prosecuted for more than three such offences. This is clear from Illustration (b), section 454.

(1) AINSLIE and McDONELL, J.J.

[CRIMINAL APPELLATE JURISDICTION.]

SHAMJEE NASHYO APPELLANT.

1878

February 6.

Section 75, Indian Penal Code—Second Conviction—Sentence.

Where, soon after his release on expiry of a sentence of seven years' imprisonment on conviction of "receiving stolen property acquired by dacoity," a person is convicted of house-breaking and theft, he is sufficiently punished by a sentence of seven years in transportation; a sentence of transportation for life is too severe.

It is not the intention of the Legislature that a previous conviction should so enormously enhance the heinousness of petty offences.

CRIMINAL APPEAL against the order of the Sessions Court of Dinagepore, convicting the appellant under sections 457 and 380 of the Indian Penal Code of house-breaking by night in order to commit theft, and of having committed theft in a dwelling-house, having been previously convicted of dishonestly receiving stolen property acquired by dacoity (section 412), and sentencing him to transportation for life under section 75.

The facts of this case are sufficiently set forth in the following judgment of the Sessions Judge:—

"The prisoner is charged with house-breaking with intent to commit theft, and again with theft in a dwelling-house, being an old offender. The Assessors would acquit on the first charge. On the second one would acquit, and the other would convict. I agree with the latter in preference to the former. The case is a very simple one. The prisoner's own statement corroborates the story for the prosecution, which there is, generally, no reason for doubting. It is a case requiring few words. When a man, who has only recently come out from a seven years' incarceration, is found so soon erring as in the present case, it is clear that he is a man who ought to be put beyond the reach of temptation, for his own sake, and for the sake of the community. In such a case limited imprisonment would seem to be an unsuitable punishment, and I do not think that transportation for life is more than should be awarded. The prisoner Shamjee Nashyo is sentenced to transportation for life."

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SHAMJEE
NASHYO.

The judgment of the High Court (1) was delivered by

JACKSON, J. :—

Judgment.

JACKSON, J.

The prisoner was properly convicted, but the sentence appears to us to be greatly beyond the requirements of the case. His offence was that, in company with two others, he had stolen some articles of trifling value, a theft which under ordinary circumstances would have been adequately punished with a few months' imprisonment. But he had previously been convicted of receipt of property acquired by dacoity, and had undergone a sentence of seven years' imprisonment. For this reason the Sessions Judge, under the provisions of section 75 of the Indian Penal Code, has sentenced the prisoner to transportation for life. We think it was not the intention of the Legislature, and is not in accordance with reason, that a previous conviction should so enormously enhance the heinousness of petty offences. We reduce the sentence to one of seven years, and in deference to the opinion of the Judge we commute the imprisonment to transportation.

.. (1) JACKSON and CUNNINGHAM, J.J.

[CRIMINAL APPELLATE JURISDICTION.]

AMEENODEEN APPELLANT.

1878
February 12.*Section 217, Indian Penal Code—Nature of such offence.*

To constitute an offence under section 217, Indian Penal Code, it is not necessary that there should be proof that the person whom the public servant intended to save from legal punishment had committed an offence or was justly liable to legal punishment.

Queen vs. Joy Narain Pattor, 20 W. R., 66, distinguished.

CRIMINAL APPEAL from an order passed by the Sessions Judge of Backerganj, sentencing the appellant to two years' rigorous imprisonment and to a fine of Rs. 100, or, in default, to six months' further rigorous imprisonment, for offences under sections 218 of the Indian Penal Code.

The following facts were established in the Sessions Court :—

Adhuri Dhapa caught Radha Churn Dhapa with his wife, and cut off his ear. On 28th July Radha Churn made a complaint to the Police Station, in charge of which the appellant was the head constable. He failed to enter the fact in the Police Diary or to report it, but hushed it up, inducing the parties to come to a compromise.

On the 8th August, as Radha Churn became worse, the head constable, appellant, recorded the statement of Maddon, the brother of Radha Churn, as a first information, to the effect that his brother had fallen from a "Tong" and split his ear, and that as he had not improved under the care of a *kobiraj*, he should be sent to the hospital for treatment, which was done. Shortly afterwards Radha Churn died of tetanus.

The appellant was accordingly tried and convicted by the Sessions Judge in concurrence with the assessors of having, when in charge of Gournuddy Police Station as head constable, induced Radha Churn Dhapa to compromise his case, and in further violation of his duty in having suppressed the fact that Radha Churn came to complain on the 20th July, and so framed an incorrect record with the view to screen Adhuri Dhapa from legal punish-

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OODEEN,
Convict.

Judgment.

ment, being offences punishable under sections 217 and 218 of the Indian Penal Code.

The Sessions Judge also, but differing from the assessors, convicted the appellant of having, on the 8th and following days of August, framed his special diaries in an incorrect manner, with the intent or knowing it to be likely that he could screen Adhuri Dhapa from legal punishment.

M. M. Ghose, and Moonshee Surajul Islam, for Appellant.

The following judgment of the High Court (1) was delivered by

JACKSON, J. JACKSON, J. :—

It has been pressed upon us in this appeal that the prisoner has not been duly convicted under section 217 of the Indian Penal Code, because there was not before the Court, upon the present trial, any evidence to show that in the point of fact an offence had been committed, still less that such offence had been committed by the person in respect of whom the wrongful act of the Police Officer, the prisoner, had been done. What appears is, that a person named Adhuri Dhapa was charged before the Court of Session and was tried and acquitted of an offence, the act of offence charged being the cutting off of somebody's ear, and it appears that the particular act which the prisoner in this case had committed, and which amounted to knowingly disobeying a certain direction of the law as to his conduct as a public servant, had a tendency to save a person, namely, the person charged, as first stated, from legal punishment. It appears to me quite sufficient for the purpose of a conviction under section 217 that the accused has knowingly disobeyed any direction of the law as to the way in which he is to conduct himself as a public servant, and that he should have done this with the intention of saving a person from legal punishment, and that it is not further necessary to show that in point of fact the person so intended to be saved had committed an offence or was justly liable to legal punishment. It appears to me certain that a public servant charged under that section is equally liable to be punished, although the intention which he had of saving any person from legal punishment was

(1) JACKSON and CUNNINGHAM, J.J.

founded upon a mistaken belief as to that person's liability to punishment. We have been pressed with a case in which I myself gave judgment—the case of *Queen vs. Joy Narain Pattur*, in 20 W. R., page 66. It is not necessary for us at present to consider whether that judgment was right, because the section on which that case turned was wholly different from the section now under consideration. That is a section under which any member of the community is punishable; and it is one under which the essence of the offence is that the person to be dealt with must know or have reason to believe that an offence has been committed. This is an offence applying only to public servants, and an act of a certain kind is made punishable as an offence when such act is done knowingly against the direction of the law and with the intention of saving a person from legal punishment, whether the person so intended to be saved from punishment had committed the offence or not. I think, therefore, that the conviction in this case was right, and that the appeal must be dismissed.

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Judgment.

JACKSON, J.

[CRIMINAL REVISIONAL JURISDICTION.]

1878
February 12.

IN THE MATTER OF SHONAI PARAMANICK . PETITIONER ;

AND

JOGENDRO SHAHA AND ANOTHER . . . OPPOSITE PARTY.

Section 521, Code of Criminal Procedure—Power to withdraw order passed—Value of evidence—Court of Revision.

When after enquiry a Magistrate finds that there is no sufficient cause for proceeding under section 521 of the Code of Criminal Procedure, he is competent to let the matter drop.

As a Court of Revision, the High Court will not enter upon a consideration of the value of the evidence on which the Magistrate decided so to act.

THIS was a case referred by the Sessions Judge of Rajshahye to the High Court, as a Court of Revision, for the reversal of an order of the Magistrate in charge of the Division of Nattore, refusing to proceed with a matter under section 521 of the Code of Criminal Procedure.

The facts of this case were thus stated by the Sessions Judge :—

“A petition was presented to the Assistant Magistrate of Nattore by one Shonai Paramanick, complaining that Shama Sundari Chowdarani and Jogendro Shaha had obstructed a public thoroughfare in his village. This petition was made over for decision by the Assistant Magistrate to a Sub-Deputy Magistrate, who returned it to him as beyond his powers. It appears to have been then made over to the police for enquiry, by an order dated 28th February 1877 (though the order of the Sub-Deputy returning it to the Assistant Magistrate is dated 29th February.) The police report has no order on it, but a petition of objection of the opposite party bears an order to the effect that the party petitioned against is to open the road within a week, or to appear and show cause against doing so. The next order, on a petition for a second investigation, is that the Sub-Deputy should investigate. This he did, and made a report after taking the statements of witnesses to the effect that the road was not a thoroughfare, but a private road.

"On inspection of this report, the Assistant Magistrate directed that the case should remain in the sherrista. The petitioners apply to have the case referred; their principal grounds being (1) that the Assistant Magistrate should not have referred the case for investigation to the Sub-Deputy and disposed of it on his report merely; and (2) that the materials before the Sub-Deputy showed that the road was a public thoroughfare.

"With regard to the first point, I think the Assistant Magistrate erred. By section 521, Criminal Procedure Code, he was empowered to issue an order to the persons complained against to remove the obstruction or to show cause against doing so. This he did, and it must be presumed that he was, before doing so, satisfied of the necessity for such order. Having done this, he was required, on the appearance before him of the persons complained against, himself to 'take evidence in the matter' (section 525.) Instead of this, however, he made over the case to the Sub-Deputy Magistrate, and passed an order on his report.

"As to the second point, the evidence taken by the Sub-Deputy is, as usual in such cases, very conflicting, but it certainly seems to me that it establishes the existence of a 'public thoroughfare,' i.e., a thoroughfare used at will by the section of the village community living in a certain part of the village. However, I think the first point taken is sufficient to vitiate the proceedings, the Assistant Magistrate having clearly departed from the provisions of the law as to the manner in which the case should have been disposed of."

The following order was passed by the High Court(1) :—

We think that there are no grounds in this case for the exercise of our powers of revision. The Magistrate having satisfied himself that there was no cause for acting under section 521, was, in our opinion, at liberty to let the proceedings drop. As to the second ground, the propriety of the finding is not a matter for our consideration.

(1) JACKSON and CUNNINGHAM, J.J.

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MATTER OF
SHONAI
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ANOTHER.

Statement.

[CIVIL APPELLATE JURISDICTION.]

1877
August 20.

ROOP LALL MULLICK PLAINTIFF;

AND

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February 11.RAJENDRONARAIN MOONSHEE
AND ANOTHER } DEFENDANTS.*Suit against one of several joint Contractors—Joint Contract—Usages—Contract Act, IX of 1872, section 43.*

A judgment, obtained against one or more of several joint contractors, operates as a bar to a new suit against any of the others. The fact that the joint contractors are trading partners does not affect the rule.

The effect of section 43 of the Indian Contract Act is to allow the promisee to sue one or more of several joint promisors in one suit, and to prohibit a defendant in such a suit from objecting that his co-contractors ought to have been sued with him.

King vs. Hoare, 13 M. and W., 494; *Brinsmead vs. Harrison*, L. R., 6 C. P., 584; 7 C. P., 547; *Nuttoo Lall vs. Skunkur Lall*, 10 B. L. R., 200, cited and approved.

APPEAL from a decree passed by Mr. Justice KENNEDY, in the Original Civil Jurisdiction of the High Court, dismissing the plaintiff's suit.

In this case it appeared that Rajendronarain, Debendronarain, and Gcurhurry Shaw were indebted to the plaintiff in the sum of one thousand rupees, to secure which they, on the 28th of November 1873, gave to the plaintiff the following promissory note:—"On demand we promise to pay Baboo Roop Lall Mullick the sum of one thousand only, bearing interest at the rate of twelve per cent. per annum, value received in cash." Date and signature of Gourhurry Shaw, for himself and the other defendants, appended.

On the 2nd of September 1874, plaintiff instituted a suit against the three parties above named for the amount of the promissory note with interest; and, on the 31st of May 1875, it was ordered and decreed that the suit be withdrawn as against the defendants Rajendronarain and Debendronarain, with liberty to the plaintiff to bring a fresh suit against them for the same matter; and that

the defendant Gourhurry Shaw do pay to the plaintiff the amount of the note, with interest and costs.

The decree against Gourhurry Shaw remained unsatisfied, and plaintiff instituted the present suit against Rajendronarain and Debendronarain. The case having come on for hearing, the following judgment was delivered by

KENNEDY, J. :—

I am asked to hold that the 43rd section of the Contract Act converts into a joint and several promise every joint contract, because it makes, in the absence of special agreement, every joint contract enforceable against any one of two or more joint promisors. I cannot hold that. The Statute makes no further alteration than it professes. It leaves the law without the slightest change, except that it abolishes the plea in abatement for non-joinder of defendants in the very few cases in which it was available in the later state of the law.

Before the Contract Act the promisee could compel one of the promisors to perform a joint and several promise, unless he was met by a plea in abatement; and when he was compelled to make them all parties yet, so soon as judgment was recovered, he could enforce it against any one of them; and we must remember that the question of pleading really had little if anything to do with the objection. The language of Baron PARKE, in *King vs. Hoare*, 13 M. and W.; 505, puts the reason in a very clear light: "We do not think that the case of a joint contract can, in this respect, be distinguished from a joint tort. There is but one cause of action in each case. The party injured may sue all the joint tort-feasors or contractors, or he may sue one,—subject to the right of pleading in abatement in the one case, and not in the other; but, for the purpose of this decision, they stand on the same footing. Whether the action is brought against one or two, it is for the same cause of action. The distinction between the case of a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense, that if sued severally and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several

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bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all, and the several bonds of each of the obligors, and gives different remedies to the obligee." And he proceeds in page 506, after a reference to the effect of a plea in abatement: These considerations lead us, quite satisfactorily to our own minds, to the conclusion that when judgment has been obtained for a debt as well as for a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party."

This decision was referred to and upheld in *Brinsmead vs. Harrison*, L. R., 7 C. P., 547, affirming the judgment of the Common Pleas at L. R., 6 C. P., 584. Indeed, that being the case of a tort is something stronger, as in that case a plea in abatement for non-joinder of a defendant could never have been maintained. How does the question now stand affected by the Contract Act? I confess myself to be wholly unable to see that, except so far as the question of pleading, it has made any difference in the liabilities of the parties. There is a decision in 4 W. R., 50, *Ramrutton Roy vs. Chunder Seekur*, which might seem favourable to the plaintiff's contention. It is not very clearly reported, but it would seem that the bond there was executed only by one party (the person first sued), and that the subsequent suit was based only on a supposed equitable liability of the other defendant. However this may be, the decision was afterwards considered in a case before Sir RICHARD COUCH and Mr. Justice AINSLIE, reported in 10 B. L. R., 200—*Nuttoo Lall vs. Shunkur Lall*, in which the Court dissented from the case in 4 Weekly Reporter (which was a decision of the majority, TREVOR and E. JACKSON, J.J., against Justice STEER), and it was there laid down in express terms, in page 204, that "if there be a joint contract—not a joint and several, but a joint contract—and the party sues upon it and gets judgment, he cannot bring a fresh suit against the parties who were jointly liable, but were not included in the former suit." This is a direct decision of the Appellate Court, and the language of the Statute by no means contemplates successive suits. This very case shows the necessity of such a rule. A speculative attorney might bring three suits instead of one, and I am bound to put the construction on the language of the Statute

which prevents such an abuse as this—a possibility of abuse on which KELLY, C.B., much relies in *Brinsmead vs. Harrison*, L. R., 7 C. P., at 552. The plaintiff may select one, or he may sue all; but he cannot do both. He must make his election and abide by it. In this case, to use the words of Lord Justice TURNER in *Ex parte Huggins*, 3 De G. and Jones, 38, the plaintiff “has made his deliberate election to pursue his remedy against one debtor, and that having failed, he is now attempting to have recourse to the others;” and I must, therefore, dismiss this suit against the now defendants with costs.

The order withdrawing the suit against these defendants with liberty to sue again, made as it was behind the backs of these defendants, cannot in any way prejudice them.

Plaintiff appealed on the ground that the learned Judge was wrong in holding that the suit could not be maintained by reason of the previous judgment recovered by the plaintiff against Gourhurry Shaw; that judgment remaining unsatisfied, and leave having been given to bring this suit.

Hill, for the Appellant.

The decision in *King vs. Hoare*, 13 M. & W., 494, cannot, it is submitted, govern the present case, for two reasons, the first of which is founded on the nature of the obligation created by a joint contract, and the second on a consideration of the principles upon which the doctrine of merger rests. As regards the first of these reasons, it cannot be said that, by contracting jointly with others, the joint contractor excludes his several liability altogether. The joint contract is the contract of each joint contractor—*Whelpdales' case*, 5 Rep., 119; judgment may be recovered on it in a suit against one alone unless he plead in abatement, and upon judgment recovered against all, execution may be had against any one. There is only one debt due to the creditor, whether the contract by which it is secured be a joint or a joint and several one, and in either case the creditor may sue any one of his debtors for that debt, but with this difference that, while pleas in abatement existed, the joint contractor might demand as a right the joinder of his co-contractors with himself. That was the peculiar right for which

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he had contracted, and it could not be taken away from him without his consent. This is the view taken by BAILEY, J., in *Letchmere vs. Fletcher* (1 C. & M., 623), where he says that, if judgment be recovered in an action against one joint contractor, the only reason which prevents a second suit on the joint contract against another of the joint contractors, is the latter's right to plead in abatement. The question whether or not a second suit can be brought is, according to WILLES, J., one of procedure—*Brunsmead vs. Harrison*, L. R., 6 C. P., 584 ; and however this may be, it is submitted that the essential peculiarity of a joint contract was the reservation of a right relating to procedure. The joint contractor in effect says : " I admit my several liability, but stipulate that I shall have the right, at my option, to plead in abatement." Should any event supervene which prevents the exercise of this option, the several liability alone remains. Thus, if one of two joint contractors dies, the other remains liable for the whole debt, which is then treated as if it had originally been a separate debt—*Richards vs. Heatten*, 1 B. & A., 33. So when the Statute 3 & 4 Wm. IV., c., 42, s. 8, disallowed pleas in abatement where one of the joint contractors was out of the jurisdiction, the effect of the statute was to change joint contracts into joint and several contracts, whenever any of the joint contractors happened to be beyond the jurisdiction of the Court—per ALDERSON, B. in *Henry vs. Goldney*, 15 M. & W., 497 ; and so complete is the change that, in cases to which the Statute applies, the non-joinder of other co-contractors who are within the jurisdiction cannot be pleaded in abatement in a suit against one—*Joll vs. Curzen*, 4 C. B., 249. See further on this point the note by Mr. Cave in the 7th edition of Addison on Contracts, p. 289, in which he says that, since the passing of the Judicature Act, *King vs. Hoare*, is probably no longer law ; this can only refer to the abolition of pleas in abatement by order 19, rule 13. Even before the Judicature Act, the pendency of an action against one joint contractor could not in England be pleaded in abatement of an action against the other—*Henry vs. Goldney* ; and in this country by virtue of section 43 of the Contract Act, it is submitted that two distinct suits might be brought at one and the same time against two joint contractors. Then, does judgment recovered against one extinguish or alter the liability of the other? One of the grounds

against the second suit, stated by PARKE, B. in *King vs. Hoare*, is that an action on a joint debt barred against one is barred altogether, but under section 44 of the Contract Act the release of one joint debtor will not discharge the other. Judgment recovered, and a release stand on the same footing—*Walters vs. Smith*, 2 B. & Ad., 889. The doctrine of merger, as it obtains in England, is founded on the different degrees of security recognized by the English law. A merger takes place only when a security of a higher nature is given by the same parties—*Bell vs. Banks*, 3 M. & Gr., 267; and judgment recovered therefore, unless it affords a higher security, will not cause a merger, *e.g.*, the judgment on a bond pronounced by a Court, not of record—*Higgins' case*, 6 Rep., 45. It may be that, as regards the defendant in the first suit, the right to sue on the note is gone under the provisions of Act VIII of 1859; but the other parties to the note not being parties to that suit, and not having the right to plead in abatement, cannot avail themselves of that judgment on the ground of merger. It is true that PARKE, B., in *King vs. Hoare*, stated that there was only one cause of action on the note, whether the action were brought against one or all of the joint contractors, and the case of a joint contract was placed by him on the same footing as that of a joint tort, and the Exchequer Chamber in *Brinsmead vs. Harrison*, L. R., 7 C. P., 547, apparently adopted the same view; but when those decisions were delivered, the right to plead in abatement existed. Each of several tort-feasors infringes a right of the person to whom the wrong is done, but it is one and the same right which is infringed by all of them; whereas, in the case of a joint contract, the promisee obtains distinct rights by the contract against each of the joint contractors, subject, however, when pleas in abatement are allowed, to have those several rights bound together at the option of any one of the promisors. If the right to plead in abatement be taken away, the separate rights created by the joint contract fall uncontrollably apart, and the breach of the contract gives the promisee separate causes of action, founded on the infringement of those separate rights.

T. A. Apcar and *Beeby*, for the Respondents, were not called upon.

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The following judgments were delivered by the Court : (1)

GARTH, C.J. :—

This suit was brought against the defendants to recover the amount of a promissory note, which was alleged to have been made by them jointly with one Gourhurry Shaw. It appeared from the plaint, that a former suit had been brought by the plaintiff against Gourhurry Shaw and the defendants, but as the note was signed by Gourhurry alone, professing to act for himself and the defendants, and as the plaintiff did not prove at the trial that Gourhurry had authority to act for the defendants in making the note, the plaintiff obtained a decree against Gourhurry alone, leave being reserved to the plaintiff by the learned Judge to bring another suit upon the note against the present defendants.

No satisfaction of the debt having been obtained against Gourhurry under the former decree, the plaintiff brought the present suit; but the defendants object in the first instance, that, as the liability upon the note was a joint one, the judgment obtained against Gourhurry is a bar to this suit, and that the rule laid down in the case of *King vs. Hoare*, 13 M. & W., 494, is applicable here. The defendants also raise the question, whether the plaintiff had authority to pledge their credit; but if they are right upon the question of law, it is not necessary for us to enter upon the question of fact.

The learned Judge in the Court below has decided the point of law in the defendants' favour, and I entirely agree with him. The rule which was laid down by the Court of Exchequer in the case of *King vs. Hoare*, and subsequently by the Exchequer Chamber in the case of *Brinsmead vs. Harrison*, L. R., 7 C. P., 547, is not a rule of procedure only, but of principle, viz., that a judgment, obtained against one or more of several joint contractors or joint wrong-doers, operates as a bar to a second suit against any of the others.

There is but one cause of action for the injured party in the case of either a joint contract or a joint tort; and that cause of action is exhausted and satisfied by a judgment being obtained by

(1) GARTH, C.J. and MARKBY, J.

the plaintiff against all or any of the joint contractors or joint wrong-doers, whom he chooses to sue. If a plaintiff, under such circumstances, were allowed to sue each of his co-debtors or wrong-doers severally in different suits, he would be practically changing a joint into a several liability. This rule is so fully explained by Baron PARKE in *King vs. Hoare*, and by Chief Baron KELLY in *Brinsmead vs. Harrison*, that I do not think it necessary to enlarge further upon it. It is a rule which in my opinion is founded on strict justice and public convenience; and it has been acted upon in this Court in the case of *Muttoo Lal vs. Sham Lal*, 10 B. L. R., 200.

It was next pressed upon us in the argument by Mr. Hill, that the effect of section 43 of the Indian Contract Act is to enable a promisee to sue one or more of his joint promisors severally, in two or more suits; or in other words, to change a joint liability into a several one at the option of the promisee; but this, I conceive, is not the object or effect of the section. It merely allows the promisee to sue one or more of several promisors in one suit; and so, practically, prohibits a defendant in such a suit from objecting that his co-contractors ought to have been sued with him.

It is true, that the rule upon which I am acting may possibly lead to some hardship in cases where one or more of several co-contractors is out of the jurisdiction, and the plaintiff, if he wait for his return, would be barred by the Statute of Limitations. But this is an injustice which the Legislature, if they so pleased, could easily remedy; and which has been, in fact, remedied in England by the Statute of 19 & 20 Vic., c. 97. I consider, therefore, that the appeal should be dismissed with costs.

MARKBY, J. :—

This suit was brought against the defendants to recover the amount due upon a promissory note. It was stated in the plaint that the note was made by one Gourhurry Shaw, who carried on business in partnership with the defendants; that a suit had been previously brought against Gourhurry Shaw and the present defendants, and that, on that occasion, the plaintiff had obtained a decree against Gourhurry alone. By this decree the former suit as against the present defendants was ordered to be withdrawn at

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the request of the plaintiff, with liberty to the latter to bring a fresh suit against them for the same matter.

It was admitted by the defendants that they carried on business as ordinary traders in partnership with Gourhurry Shaw, and they did not deny the making of the note by Gourhurry; but they denied that Gourhurry had any authority to bind his partners by the note, which they alleged to have been fact made for the purpose of another business in which Gourhurry was concerned.

No evidence was given in the case, but it is admitted that nothing has been recovered by the plaintiff upon the decree against Gourhurry. The learned Judge below dismissed the suit upon the ground that the plaintiff, having elected to take a decree in the former suit against one of the joint makers of the note only, could not bring another suit against the other joint makers.

The note was not produced, so that we do not know the exact form of it. The question, however, as I understand it, which is submitted for our consideration, is this: If several persons, carrying on an ordinary trading partnership, make a joint promissory note, and one partner be sued upon it and a decree obtained, is any subsequent suit upon the same note against the remaining partners barred, even although nothing has been recovered upon the former decree? If this question be answered in the affirmative, the appeal is to be dismissed. I also understand it to have been conceded on the argument that this is a question which is to be determined by the English law of contract, except so far as the same may have been modified by the Indian Contract Act.

I think it impossible to deny that, under the English law, this suit would have been barred; and, notwithstanding the great authority of Mr. Justice WILLES, who seems to think otherwise, I should say, not as a mere rule of procedure, but upon the principles of the law of contract. If this were a mere matter of procedure, the English law would not necessarily bind us; but I understand Baron PARKE's judgment in *King vs. Hoare*, which is the leading authority, to rest upon this: that under a joint contract to pay a sum certain, there is but one single obligation, which may, indeed, be enforced severally, but can be enforced once only. Other principles are stated in the judgment, but they are either

based upon rules of pleading not applicable to the case now under consideration, or they apply only to cases where the suit is brought to recover damages, and not for a sum certain.

Of course, in all questions of this kind the liability must depend ultimately upon the intention of the parties; but I consider that it is now finally settled by the law of England that, apart from a Statute which I shall notice presently, and which is not applicable here, a joint promissory note creates an obligation which can be sued on once only. If this be, as it seems to me to be, the true mode of stating the law, all difficulty about the further question which has been argued disappears. Mr. Hill contended that section 43 of the Contract Act did away with the rule, that the second suit was barred in such a case as this. But that section does no more than place the liability arising from the breach of a joint contract, and the liability arising from a tort upon the same footing; that is to say, each wrong-doer is liable to be separately sued in respect of the whole liability. But it does not touch that which has been determined to be the nature of the obligation created by the breach of contract, namely, that it is one which can be sued on once only.

I have searched into this matter with some care, in order to see if the rule laid down in *King vs. Hoare* was really binding upon us; because, if it were not, I think it would require some consideration how far it is desirable that in such a case as this—a note made by an ordinary trading partnership—the second suit should be barred. The rule laid down by Baron PARKE in *King vs. Hoare* is very likely correct in theory. It is at any rate identical or nearly identical with the strict rule of the ancient Roman law. But it must be borne in mind that this rule was abolished in the Roman law thirteen hundred years ago; and has been since repudiated in America and every where in Europe except in England. Even in England, until the decision of *King vs. Hoare*, it was very doubtful whether the rule prevailed or not in joint contracts; whilst since that time one learned Judge (Sir JAMES KNIGHT BRUCE) has spoken of the rule in strong terms of disapprobation. (See 37 Law Jour., Ch., 29.) Lord MANSFIELD also expressed the opinion in *Rice vs. Shute*, 1 Sm. L. C., 495, that all contracts with partners were joint and several; and the rule in *King vs. Hoare*

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has been since modified by Statute in England. The 19 & 20 Vict., c. 97, s. 11, directs that the period of limitation as to joint debtors shall run, notwithstanding that some are beyond seas; but expressly provides that the creditor shall not be barred as against those out of the jurisdiction by judgment recovered against those who remain within it. If the rule laid down in *King vs. Hoare* be combined with the law of limitation here, which is very strict, it is by no means clear that a creditor might not very often be left to the choice between a remedy against an insolvent debtor or having his debt barred.

I do not deny that there are important considerations of convenience the other way. These considerations have been pointed out and insisted on by several learned Judges of great experience in England, and, just now, by the Chief Justice. I only say that, if I were at liberty to enter upon the general question of convenience, I should hesitate much before applying to this country without any qualifications the rule laid down in *King vs. Hoare*. As it is, however, I am bound to follow that decision and to hold that, this being a case governed by the English law, the learned Judge was right in dismissing the suit.

[PRIVY COUNCIL.]

HURRO PERSHAD ROY CHOWDHRY } PLAINTIFFS ;
 AND ANOTHER }
 AND
 SHAMA PERSHAD ROY CHOWDHRY } DEFENDANTS.
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 January 19.

Mesne profits—Accrual of right—Interest—Act XXXII of 1839—Practice of Sudder Court—Two concurrent findings of fact—Appeal.

Where the parties by a compromise admitted by the Court agreed to their respective rights in certain shares of land, and to relinquish and assume possession thereof, the right to mesne profits arises from the refusal to act in accordance with these terms, and not from the date of a subsequent decree affirming the previous order.

The concurrent findings of two Courts that certain *hustabood* papers are unreliable evidence is a decision on a question of fact by the Court which will not be disturbed by the Privy Council on appeal.

The construction of the late Sudder Court that—"interest on mesne profits may be awarded as of course from the date of suit in a decree when however interest is awarded from an earlier or from a later date than of suit special reasons should be assigned in a decree followed"—as indicating the then existing practice in the Courts—Act XXXII of 1839, discussed.

THIS is an appeal from a judgment of the High Court, Calcutta (RAIKES and SETON-KARR, J.J.), dated August 15th, 1863, which has not been reported.

The litigation between the parties to this appeal has been constantly before the Courts, and its course will appear from reference to 4 Moore's Ind. App., 452 ; 8 id., 308 ; Suth. P. C. cases, 427 ; and 10 Moore's Ind. App., 203 ; 3 W. R., 11, P. C.

The facts of the present case will sufficiently appear in the following judgment of the Privy Council (1) :—

The transaction out of which this suit arose occurred nearly half a century ago, and from it has flowed a continuous stream of litigation, not in all respects creditable to the earlier tribunals

(1) Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

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of India, down to the present day. A history of that litigation, given shortly and clearly, will be found in a report, in the 8th volume of Moore's Indian Appeals, p. 308, of a judgment of this Committee, which was delivered on the occasion to be hereafter mentioned. Their Lordships deem it enough to refer to that case without recapitulating the history, inasmuch as the facts necessary to the determination of the points now before them need no very lengthened statement.

Two brothers, Doorgapersaud Chowdhry and Tarapersaud Chowdhry, of whom Doorga was the elder, entered into an agreement of compromise for the purpose of settling disputes then pending between them on the 4th of April 1829. That agreement of compromise may be sufficiently described for the present purpose as one whereby in substance the elder brother took ten-sixteenths of the ancestral property, and the younger brother six-sixteenths. Tara, the younger brother, disputed this compromise upon various grounds; but it was affirmed by the Court, which was then called the Provincial Court, on the 2nd of September 1829. Tara appealed from that decision to the Court of Sudder Dewanny Adawlut, and the Court of Sudder Dewanny Adawlut affirmed the decision of the Provincial Court, and directed possession to be given to Tara of his portion of the property. Tara accepted this decision and endeavoured to obtain his rights under it, and his first step for that purpose was to apply to Mr. Ross, one of the Judges of the Court of Sudder Dewanny Adawlut, who, in concurrence with Mr. Walpole, each sitting alone, had given the judgment affirming the decree of the Provincial Court, to order *wasilat* to be given him. The decree had only decreed possession. The application was made under a circular order, which empowered the Court in such cases to award *wasilat* to be recovered by proceedings in execution; and it claimed *wasilat* from the date of the decision of the Provincial Court. Mr. Ross so far complied with this request as to order *wasilat*, not from the date when it was claimed, but from the 4th July 1832, the date on which the decision of the Sudder Dewanny Adawlut Court had been given.

The history of the litigation during the next twenty years may be thus summarized: Tara pursued every legal means in his power

to obtain his rights under that decree; that is to say, to obtain possession of the property and *wasilat* or the mesne profits for the period during which possession of it had been withheld. The elder brother, Doorga, endeavoured to defeat his claims by a variety of excuses and pretences, all of which have been found to be false. Tara succeeded in obtaining from time to time, possession of certain portions of the property, but he never appears to have succeeded in obtaining any *wasilat*. It may be enough, however, to pass on to the year 1853, when Tara obtained an order from Mr. Money for a sum of Rs. 40,000 *wasilat*, and a considerable amount of interest. Doorga appealed against that order on the ground, which he appears to have raised then for the first time, that Mr. Ross, who made the original order in respect of the *wasilat* in 1832, had acted without jurisdiction, inasmuch as he could not make the order without the concurrence of his colleague Mr. Walpole, and the Court of Sudder Dewanny Adawlut gave effect to this objection. So that the Court of Sudder Dewanny Adawlut in effect ruled that all the litigation which had gone on for twenty years was absolutely fruitless.

Under those circumstances Tara instituted the present suit in December 1853. Tara and Doorga have long since died, and this appeal is now prosecuted and defended on behalf of their representatives. The suit came on to be heard before the Principal Sudder Ameen of the day, and he decided that the Statute of Limitations was a bar to the claim of Tara to *wasilat* for more than twelve years before the commencement of the suit. But for those twelve years he gave him *wasilat*, calculated upon the footing of certain *hustabood* papers which were put in by the plaintiff. The plaintiff contended that he was entitled to avail himself of those *hustabood* papers on this ground; he said, "the *hustabood* is my rent-roll of a certain portion of lands which have been made over to me by my brother. This is some evidence in the absence of contradictory evidence of what the rent was before it was handed over, and therefore of the *wasilat* or mesne profits to which I am entitled." These *hustabood* papers had been received in the abortive proceedings which have been referred to, and were received in this case by the Principal Sudder Ameen. There were

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cross-appeals from this judgment, and the case came before the Sudder Dewanny Adawlut in the year 1857, whereupon that Court reversed the decision of the Principal Sudder Ameen, holding that the Statute of Limitations was not a bar to any portion of the claim, and remanded the case to be retried *ab initio*, as they expressed it. This judgment of the Sudder Dewanny Adawlut was on appeal affirmed by this Board in the judgment before referred to (8 Moore, Ind. App., 308; Suth., P. C., Ca., 427) : their Lordships holding that the Statute of Limitations did not apply to Tara's demand, because he had instituted *bonâ fide*, though ineffectual, proceedings for the purpose of obtaining his rights,—not, as they expressed it, under the agreement alone, but under the judgment enforcing it.

The case was then tried on the remand by another Principal Sudder Ameen. He found that the plaintiff was entitled to *wasilat* from the date of the first judicial decision, in September 1829, of the Provincial Court. On the question of the amount of *wasilat* he rejected the *hustabood* papers, and valued the land at one rupee per beegah. With reference to the question of interest, he decreed interest to the plaintiff from the date of the decree, holding that the claim of *wasilat* must be considered as then for the first time settled and liquidated. From that decree there was an appeal to the High Court, which varied the decision of the Principal Sudder Ameen as to the time from which the right of the plaintiff to *wasilat* commenced, decreeing that it commenced not from the decision of the Provincial Court in 1829, but from the decision of the Sudder Dewanny Adawlut Court in 1832 ; they affirmed the decree in other respects. From that judgment of the High Court the present appeal is preferred.

The questions now before their Lordships are—first, from what time the right to *wasilat* commenced ; secondly, what should be the amount of *wasilat* ; and, thirdly, what the amount of interest, if any, upon the *wasilat*. Upon the first question it is desirable to look to the terms of the two judgments that have been referred to. The first judgment affirming the compromise is to be found recited (it is nowhere found separately) in the judgment of the Court of Sudder Dewanny Adawlut in these terms : “ It is ordered that the deed of compromise and release be admitted, that the

case be struck off the file of this Court, and that the parties conform to these stipulations. The Court on becoming acquainted with it shall enforce the observance of the same on the refusing party." Now one of the stipulations was, that Doorga, the elder brother, who was in possession of the property, should relinquish to his younger brother six-sixteenths. It therefore appears to their Lordships that the direction to conform to these stipulations is a direction, though possibly an informal one, that Tara should be put in possession of that property. This decision was confirmed in these terms by the Court of Sudder Dewanny Adawlut: "Therefore, in concurrence with the aforesaid gentleman"—that is the Judge of the previous Court—"Ordered, that the appeal preferred by the Appellant be dismissed, and that the decision passed in the Provincial Court of Appeal, dated the 2nd of September 1829, be affirmed; that, should the appellant, agreeably to the deeds of compromise, not have received possession of his share, he be put in possession of the same on the execution of the decree." It appears to their Lordships that this decree of the Sudder Dewanny Adawlut must not be taken as establishing for the first time any new right of either of these parties, but as simply affirming, with an explanation, for it is nothing more, the former decree. The rights of the parties, therefore, depend upon the former decree, and it is the former decree which is effective, and which had to be executed. It appears to their Lordships, therefore, that Doorga after the first decree, receiving as he did all the rents and profits of the property, received the rent of six-sixteenths of it for the use of his brother (see 4 Moore's Ind. App., 452), and that he is bound to account to his brother for those rents and profits. They, therefore, agree with the view taken by the Principal Sudder Ameen upon this question, and disagree with that taken by the High Court.

The second question is as to the amount of *wasilat*. It has been contended that the Principal Sudder Ameen was bound to accept those *hustabood* papers as fixing the rate of *wasilat*, which undoubtedly was a good deal higher than the rate which he allowed. He was bound to do so, it is said, because they had been accepted by the previous Sudder Ameen, and by the Courts in former proceedings. But their Lordships do not concur in this

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view. It may be well here to read the terms in which the judgment of the Court remanding the case is couched:—"As this judgment re-opens the question of *wasilat* from the date of the deeds of adjustment, the whole evidence on that matter will require reconsideration. We therefore remand the case, that the whole question of *wasilat* may be taken up and considered *ab initio*." If the Court had expressed themselves satisfied with the award of *wasilat* within the last twelve years, and only directed an inquiry as to the additional *wasilat* accruing before that time, they might have so expressed themselves, but their Lordships think it probable that they expressed themselves as they have because there was a cross-appeal, in which the validity of these *hustabood* papers would have been disputed, abstaining from giving judgment upon that question, and remitting the whole matter to the Principal Sudder Ameen. The Principal Sudder Ameen expressed himself as dissatisfied with those *hustabood* papers, which appear to have been put in, but of which, as far as it appears, there does not seem to have been any proof given to him, although some proof seems to have been given of them on former occasions. He describes them as concocted at home by the plaintiff, and questions their genuineness chiefly on the ground that they give an annual value to the property greater than that which it bore at the time of his judgment; the value of land having notoriously very much increased since the *wasilat* claimed had accrued. He also observes that he directed, for the benefit of the plaintiff, an inquiry before an Ameen as to the value, which the plaintiff declined. Under these circumstances he forms, undoubtedly, a somewhat rough estimate of the annual value of the property as one rupee per beegah. It may be that, under the circumstances, the Principal Sudder Ameen might have been justified in accepting and acting upon these *hustabood* papers, but it is quite another question whether their Lordships are to say that he was bound to act upon them. It appears to their Lordships that this is a decision upon questions of fact, namely, the genuineness of these *hustabood* papers, and the actual value of the land, and that decision having been affirmed by the High Court, they see no sufficient reason to take this case out of the ordinary rule, whereby they affirm a decision on a question of fact come to by two Courts.

The remaining question is that of interest. And here it may be as well to refer to the terms of the Statute, Act XXXII of 1839, very much in accordance with the Statute of 3 & 4 William IV in this country, which has given rise to a great number of decisions, all of which are not easily reconcilable. The words of the section are : "It is, therefore, hereby enacted that upon all debts or sums certain, payable at a certain time or otherwise, the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment." If the Statute had stopped here, it might be that the Principal Sudder Ameen and the Court were right in saying that there was no actual ascertained or liquidated demand until the *wasilat* was determined by the decree. But these words follow : "Provided that interest shall be payable in all cases in which it is now payable by law." And that refers their Lordships to the state of the law and the practice in India independently of the Statute. They have taken some pains to ascertain what that law and practice has been, and have been referred to a number of cases upon the subject. It may be enough now to quote a case, which is to be found reported in Carrau's cases in the Presidency Sudder Court of the date of 1850, where certain resolutions were come to at a sitting of all the Judges of the Court, and among those resolutions was this : "Interest on mesne profits may be awarded as of course from date of suit in a decree; when, however, interest is awarded from an earlier or from a later date than of suit special reasons should be assigned in the decree." Their Lordships find that this resolution has been, to a great degree, acted upon in subsequent cases, indeed there have been subsequent cases in which interest has been given at a date prior to the institution of a suit, and their Lordships are far from saying that such cases have been wrongly decided. But having regard to the circum-

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stances of this case, and among them may be stated the very great delay, which has not been thoroughly explained in the prosecution of this appeal, their Lordships think it enough that the plaintiff should have a decree for interest upon the mesne profits decreed to be calculated from the commencement of the suits up to the date of the decree. The decree will carry interest on the whole amount decreed from its date, at the usual rate of 12 per cent.

They will, therefore, humbly advise Her Majesty that the decree of the High Court be reversed, that the decree of the Principal Sudder Ameen be affirmed as to the amount decreed to the plaintiff for mesne profits, and reversed as to the residue, and that it be ordered that the defendant pay to the plaintiff interest on the amount decreed for mesne profits at the rate of 6 per cent. per annum, to be calculated from the date of the commencement of the suit to the date of the decree of the 18th February 1861, and that the costs in the first Court be ascertained and be paid by the parties respectively in proportion to the amount to be decreed and disallowed by the decree so to be amended, and that the defendant do pay interest at the rate of 12 per cent. per annum upon the total amount to be decreed by the decree so to be amended as aforesaid, from the date of the decree of the 18th February 1861 to the date of realization; that the costs of the appeal in the High Court be assessed and ordered to be paid by the parties to that appeal respectively in proportion to the amounts to be decreed and disallowed by the decree to be amended as aforesaid. And it will be ordered that the respondents do pay the costs of this appeal.

[CIVIL APPELLATE JURISDICTION.]

MATHOOR MOHUN ROY PLAINTIFF;

AND

THE BANK OF BENGAL DEFENDANT.

1877
August 10.1878
February 11.*Bank of Bengal Transfer of Share Certificate—Refusal to transfer—Act XI
of 1876, sections 17, 20, 21. (1)*

The language and the evident intention of section 17, Act XI of 1876, points to a present debt only as conferring upon the Bank of Bengal a right to refuse to register a transfer of a share certificate.

Stockton Iron Malleable Co.'s case, 2 Ch. D., 101, cited and approved.

In order to entitle a plaintiff to a mandatory order directing the Bank of Bengal to register a transfer, the plaintiff must show that he applied for such registration at a time and under circumstances when the Bank was enabled and bound to comply with the request. An application made during a time when, in accordance with Act XI of 1876, section 20, the transfer books are closed, has no more effect than if it had never been made.

APPEAL from a decree passed by Mr. Justice MACPHERSON in the Original Civil Jurisdiction of the High Court.

This was a suit to compel the registration of the transfer of a stock certificate of the defendant bank, and for damages. It appeared that, on the 3rd of May 1876, one Radha Gobind Shaw pledged a stock certificate of the Bank of Bengal with the plaintiff as security for the payment of Rs. 20,000. Plaintiff alleged that, on the 14th of June 1876, he presented the stock certificate to the Bank of Bengal in order to have the transfer registered in his own name; and that the Bank refused to do this on the ground that the certificate was not indorsed to the plaintiff by the proprietor, Radha Gobind Shaw, or his constituted attorney.

(1) PRESIDENCY BANK'S ACT:

SECTION 17.—If any proprietor or shareholder is indebted to the Bank, the Bank may withhold payment of the dividend on the stock or shares of such proprietor or shareholder not being registered as held in trust, or as executor or administrator, and apply them in payment of the debt; and the Bank may

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On the 27th of June 1876, Radha Gobind Shaw gave a power of attorney to one Utool Behary Dhur to indorse the certificate to the plaintiff, who (as he alleged) presented it so indorsed for registration on the 1st of July 1876; and again the Bank refused (as he alleged) to register the transfer, on the ground that Radha Gobind Shaw was indebted to them, and that, therefore, no transfer could take place while the indebtedness continued.

On the other hand, the Bank stated that a few days after the 6th of July 1876, an application was made to them on behalf of Radha Gobind Shaw for payment of the half year's dividend declared on the 6th of July; that they refused to pay the dividend, on the ground that Radha Gobind Shaw was then indebted to the Bank; that no application was made for the registration of the transfer of the share certificate, except one on the 31st of

refuse to register the transfer of any such stock or shares until payment of such debt; and after demand and default of payment, and notice in that behalf, given to such proprietor or shareholder, or his constituted agent, or by public advertisement in the local Official Gazette, the Bank may advertise in the local Official Gazette such stock or shares for sale on a day not less than fifteen days from the publication of such advertisement; and may, on such day, sell by public auction, and subject to such conditions, if any, as the Bank thinks fit, such stock or share, or so much or so many thereof as may be necessary, and apply the proceeds thereof in or towards payment of the said debt, with interest, from the day appointed for the payment of such debt to the time of actual payment, at such rate as may have been agreed upon, or, in the absence of such agreement, at the highest rate current for advances by way of local discounts by the Bank; and shall pay over the surplus, if any, to such proprietor or shareholder, or to his lawful representative.

SECTION 20.—Every transfer of stock or shares may be by endorsement on the certificate or in such other form as the Board from time to time may approve, and shall be presented to the Bank, accompanied by such evidence as the Board may require to prove the title of the transferrors. Every such transfer shall be verified in such manner as the Board require, and the Board may refuse to register any such transfer until the same be so verified, and, in the case of shares not fully paid up, unless the transferee is approved by the Board. The transferrer shall be deemed to remain the proprietor or holder of the stock or shares transferred until the name of the transferee is registered in respect thereof.

SECTION 21.—The directors may, from time to time, close the register and transfer-books of the bank for any period or periods not exceeding in the whole thirty days in any twelve consecutive months.

July 1876, which registration they refused to make, on the ground that Radha Gobind Shaw was then indebted to the Bank.

The Bank had between the 5th of May 1876 and the 21st of June 1876, discounted acceptances of Radha Gobind Shaw's to the amount of Rs. 97,500. These bills fell due on different dates between the 4th of July and the 9th of September 1876. Radha Gobind Shaw, knowing that he would be unable to meet the bills at maturity, entered into an arrangement with the Bank on the 8th of July 1876, by which he agreed to pay the Rs. 97,500 in monthly instalments of Rs. 5,000 each, the first instalment to become due and payable on the 1st of October 1876, and for the purpose of securing the payment of these instalments he mortgaged certain property. The Bank had also discounted two bills which had been accepted by Radha Gobind Shaw, amounting to Rs. 10,000; these bills fell due on the 22nd and 24th of July 1876, and were not included in the above arrangement.

At the hearing, the plaintiff gave evidence to show that, on the 3rd of July 1876, Brojo Lall Roy, the son of the plaintiff, had called on the Secretary of the Bank to make an application for the registration of the transfer; this the Secretary denied. The following judgment was delivered by

MACPHERSON, J. :—

I have no hesitation in finding that the plaintiff has failed to prove that any application was made to the Bank of Bengal to transfer this share, until the end of July. I find, in fact, that the plaintiff's case is not true; and I believe that the letters relied on are not what they purport to be.

The demand for the transfer of the share, which is stated in the plaint, is said to have been made on the 1st of July, and it is not there alleged that any later application was made; and subsequently when, several months after the plaint was filed, Mr. Hardie, the Secretary of the Bank of Bengal, was examined *de bene esse*, it was never even suggested to him in cross-examination that any application, save that of the 1st of July, had been made until the 31st of July; yet if the evidence of the plaintiff's son, Brojo Lall Roy, be true, it appears that Brojo Lall Roy himself, on the 3rd of July, saw Mr. Hardie, and there made an

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application for the transfer, which was refused. It is simply incredible that if Brojo Lall Roy, who was managing the plaintiff's business in Calcutta, had personally applied on the 3rd of July, and been refused by Mr. Hardie, that fact would have been omitted not only in the plaint, but in the instructions given to the plaintiff's attorney so lately as the date of Mr. Hardie's examination. But Brojo Lall says that, on the 3rd of July, he went first to Madhub Chunder Sein, the *Khazunchi*, and then to Mr. Gordon, the Chief Accountant of the Bank ; and he gives details of what passed between him and Mr. Gordon on that day. Madhub Chunder Sein, however, denies that any such interview took place ; and Mr. Gordon swears that Brojo Lall Roy never came to him on the 3rd of July, or on any day about that time. Mr. Gordon says expressly that nothing was said to him by any body about the transfer of this share until the 31st of July, when he took Brojo Lall to Mr. Hardie. Altogether, I disbelieve Brojo Lall's account of what occurred on the 3rd of July. As to the demand for the transfer of the share, alleged to have been made by Nobodeep Chunder Talookdar on the 1st of July, it is not proved, and I do not believe any such demand was made. It is not merely that Nundo Coomar Dey denies that nothing of the kind took place, but Mr. Gordon swears that it did not take place, and that he never had any interview on the subject with Nobodeep Chunder.

On consideration of the whole case I find that no demand was made until the end of July ; and that, when it was made, Radha Gobind Shaw was indebted to the Bank, and the Bank was entitled to refuse to register the transfer. Therefore, the plaintiff's case must be dismissed with costs.

Plaintiff appealed.

J. D. Bell (*Branson* and *Bonnerjee* with him), for the Appellant, contended that the learned Judge was wrong in holding that no application for the registration of the transfer was made on the 1st of July 1876, such application being clearly proved by the evidence. At that time there was no debt due, and the Bank should not have refused to register the transfer. Even if it be held that no application was made till the 31st of July, still,

under the arrangement, there was no debt due till the time of payment on the 1st of October, and therefore the Bank should not have refused the transfer,—the word “debt” in Act XI of 1876, section 17, meaning a present debt, realizable by action, and not a sum of money payable at a future time.

Branson, on the same side, cited the *Stockton Iron Malleable Co.*, 2 Ch. D., 101; *Cooke’s Bankruptcy*, p. 204; Statute 7 Geo. I, c. 31.

Paul (Advocate-General), *Evans*, and *Stokoe*, for the Respondent, contended that no application for transfer was made until the 31st of July. Granting, however, that the plaintiff’s allegations were true, still all the applications made previous to that on the 31st of July were made when, in accordance with section 21 of Act XI of 1876, the transfer books were closed; and, therefore, such applications were of no effect. When the application was made on the 31st of July, Radha Gobind Shaw was indebted to the Bank in the sum of Rs. 10,000, concerning which no arrangement had been made, and the Bank were, on this ground, clearly justified in refusing the transfer.

The judgment of the Court (1) was delivered by—

GARTH, C.J. :—

This is a suit brought by the plaintiff, who is a merchant in Calcutta, to obtain an order from the Court upon the defendants, the Bank of Bengal, to register the transfer of a certificate of stock in the defendants’ Bank for Rs. 17,458-8-8, which transfer was alleged to have been made to the plaintiff, by way of pledge, by one Radha Gobind Shaw, to secure certain advances.

The plaintiff’s case was, that he applied in the first instance to the Bank to register this transfer about the 14th of June 1876, and that he was then told by the Bank officers that before the certificate could be registered, it must be endorsed over by Radha Gobind Shaw or his duly-constituted attorney. Upon this, the plaintiff says that he obtained from Radha Gobind a power of attorney, dated the 27th of June 1876, empowering one Utool

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Behary Dhur to make the transfer of the certificate to him ; that the transfer was accordingly made ; and that the plaintiff sent it to the Bank to be registered on the 1st of July 1876 ; but that the officers of the Bank then refused to register it, on the ground that Radha Gobind Shaw was indebted to them in a large amount, and, as long as his debt remained unpaid, the transfer could not be registered.

The plaintiff says that, on the 30th of July 1876, he caused another application to be made to the Bank, to know why the transfer could not be registered ; and he was informed that so long as Radha Gobind Shaw was indebted to the Bank, they could not register it ; and again on the 31st of July he says that, having ascertained that Radha Gobind Shaw had made an arrangement with the Bank by which the payment of his debt to them was postponed to a future day, he again applied to the Bank to have the transfer registered, but was refused upon the same ground as before.

The plaintiff contends that the Bank was bound to register the transfer upon the application made on the 1st of July 1876 ; because, although Radha Gobind Shaw had, no doubt, given bills to the Bank to a large amount, none of these bills had then arrived at maturity ; and he further contends that they were bound to register the transfer on the 31st of July, although in the meantime the bills had arrived at maturity, because an agreement had then been made between Radha Gobind Shaw and the Bank on the 10th of July by which he pledged property to a large amount to secure the payment of the bills, and that the payment was postponed by that agreement till the 1st of October following ; so that on the 31st of July there was *no debt* due from him to the Bank, which they could at that time have enforced.

The defendant's answer is that, as regards the applications, which are said to have been made on the 1st and 3rd of July, the plaintiff's case is entirely untrue. They admit that, early in July, the plaintiff's son applied for the dividends due upon the stock standing in Radha Gobind's name, and was refused upon the ground that Radha Gobind was indebted to the Bank ; but they say that no application was made to register any transfer till the 31st of July ; and, although they admit that an agreement was made with Radha

Gobind Shaw on the 8th of July, by which the payment of most of the bills was postponed till the 1st of October 1876, there were two bills which became due on the 22nd and 24th of July for Rs. 5,000 each, which were not included in that arrangement; and that, consequently, on the 31st of July there was a debt of Rs. 10,000 due from Radha Gobind to the Bank, the payment of which the latter might then have enforced.

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The defendants further contend, with reference to the applications said to have been made on the 1st and 3rd of July, that, even assuming the plaintiff's case were true, the transfer was not made or tendered to the Bank for registration, in such a form as the Bank were bound to recognize; and moreover, that from the 1st to the 15th of July, inclusive, the Bank transfer books were closed in accordance with the provisions of section 21 of their Act, (XI of 1876), and that consequently the Bank were not bound, and, according to their usual course of business, were not in a position to register the transfer during that period.

The Bank was also at one time under the impression that even during the currency of the bills, when the Bank had no present right to sue Radha Gobind upon them, they could still, under the 17th section of the Act (XI of 1876), refuse to register the transfer, but this is clearly not so. The language and the evident intention of that section point to a present debt only as conferring a right upon the Bank to refuse either to register a transfer or to pay dividends; and this view is strongly fortified by the English case of the *Stockton Malleable Iron Co.*, 2 Ch. D., 101, in which it was held that the words "due" and "indebted" in the Articles of Association of a Trading Company, which gave to the Company a lien upon shares similar to that given by this Act to the defendant, must be taken to refer to debts presently payable. With reference, however, to the demand of registration alleged to have been made on the 31st of July, it has been distinctly proved that the two bills of Radha Gobind which matured on the 24th and 22nd of July, were not, for some reason or other, included in the mortgage arrangement, which was made between the Bank and Radha Gobind on the 8th; so that the amount of these bills was due to the Bank on the 31st, and the Bank were therefore clearly justified in refusing the transfer on that day.

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The plaintiff's case, therefore, wholly depends upon the applications which are said to have been made on the 1st and 3rd of July. The learned Judge in the Court below has entirely disbelieved the plaintiff's story as to these applications; and he has gone so far as to say that the documentary evidence, adduced by the plaintiff in support of that part of his case, was not what it purported to be; or in other words, as we understand the judgment, that this evidence was fabricated for the purpose of trial. In this we are quite unable to agree with the learned Judge. It is not necessary for us, having regard to the ultimate conclusion at which we have arrived, to examine in detail the evidence which has been adduced on either side upon this part of the case, or to consider whether the form in which the transfer of the stock was made and tendered to the Bank, was one which they were legally bound to recognize. But we feel it only due to the plaintiff, who is a respectable merchant in Calcutta, to say that, in substance, we believe his story; and we think that the probabilities of the case tend rather to the conclusion that the application, which is admitted to have been made by the plaintiff at the beginning of July, was not for the dividends upon the stock, as the defendants assert, but to obtain registration of a transfer.

It was strongly urged upon us by Mr. Evans, in the course of his very able argument, that it was impossible for the Court to find in favour of the plaintiff upon this point, without impeaching the honesty and veracity of Mr. Hardie, the Secretary, and of Mr. Gordon, the Manager of the Bank of Bengal; and that the question was one which entirely depended upon the credibility of the plaintiff's witnesses on the one hand, and of the defendant's witnesses in the other. But this view, as we consider, is entirely erroneous, and proceeds upon a misconception of the weight and nature of the evidence on either side. We have not the least reason to doubt that Mr. Hardie and Mr. Gordon, who are gentlemen of high character and position, or indeed any of the witnesses called for the Bank, gave their evidence to the best of their recollection, and with perfect truthfulness and honesty. But, having regard to the large variety of business-matters which are continually passing through their hands, and also to the admitted fact that the plaintiff and those in his employ

were almost daily in the habit of going to the Bank about some business or another, it would indeed be surprising if Mr. Hardie, or Mr. Gordon, or any of the Bank officials were able to recollect with accuracy of date and circumstance, and many months after the events occurred, the visits and conversations which are deposed to by the plaintiff's witnesses, and which, as they resulted in nothing, would, in the ordinary course of things, probably not have been alluded to in any note-book or other memorandum.

The plaintiff's case, no doubt, could not be disbelieved by the Court, without imputing to him and his witnesses the most wicked fraud and perjury ;—because his story is told with a minuteness of detail, and accompanied by the production of documents which, unless his account be true, must be designedly false and fabricated. But on the defendant's side it is otherwise. Mr. Hardie very naturally recollects little of the matter ; and Mr. Gordon might very easily be mistaken as to the dates and events which he has honestly endeavoured to re-call to his memory. We think, therefore, that in substance there is no reason to disbelieve the plaintiff as to the applications to register the transfer which were made on the 1st and 3rd of July.

But then there arises the formidable objection, which was made by the defendants in the Court below, but which it was then not necessary to consider, that the application for the registration of the transfer was made during the period when the books were closed. We consider that this objection must prevail. In order to entitle the plaintiffs to ask the Court for a mandatory order directing the Bank to register the transfer, it is clear that the plaintiff must show, in the first instance, that he applied for such registration at a time and under circumstances when the Bank was enabled and bound to comply with his request.

It was impossible for the Bank to comply with it at a time when the books were closed ; and, although that reason for not registering might not have been given by the Bank when the application was made, we think that they have a perfect right to avail themselves of it now ; because it is one which, in justice to their other customers and to the public, they could not by any extraordinary concession in the plaintiff's favour or otherwise have removed ; and

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1877-78 it is one, too, of which the plaintiff is common with the rest of
MATHOOR the public must be taken to have been aware, because the power
MOHUN ROY under which the closing of the transfer books took place is con-
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BENGAL. Public Act), and the fact that the transfer books would be closed
Judgment. upon the 1st and the 3rd of July, was publicly notified by the
GARTH, C.J. Bank in accordance with the statutory directions. We are of
opinion, therefore, for these reasons, that the plaintiff's case must
fail; and that this appeal should be dismissed with costs.

[CIVIL REFERENCE.]

IN THE MATTER OF SHAIKH HARAS- }
 TOOLLAH AND OTHERS } APPELLANTS;

1878
April 1.

AND

BROJO NATH GHOSE OPPOSITE PARTY.

Auction-Purchaser—Sale in Execution of Decree—Resistance or Obstruction to Possession—Act X of 1877, sections 334, 335.

If the purchaser at a sale in execution of a decree be resisted or obstructed when being put in possession by the Court as provided by the new Code of Civil Procedure, Act X of 1877, the Court can now act only under section 334 or section 335 of that Code.

There is no provision in the Code for a summary inquiry on resistance or obstruction to the possession of an auction-purchaser caused by a stranger claiming to be in actual possession under a title altogether independent of the judgment-debtor.

THIS was a reference to the High Court, under section 617 of the new Code of Civil Procedure from the Subordinate Judge of Hooghly, the terms of which are as follows:—

“In execution of a decree obtained by one Brojo Nath Ghose against one Sumnerooddeen, the property, which is the subject of the present dispute, was sold as the property of the judgment-debtor, and purchased by the decree-holder himself. The purchaser, as usual, asked the assistance of the Court to be put in possession of the property purchased by him, and delivery of possession was ordered under the due course of law. The applicant thereupon presented a petition, setting up a title to a moiety of the property, for an investigation into his right, and for recovery of possession on the ground of having been dispossessed by the said purchaser. It is contended on behalf of the purchaser that there is no provision in the Civil Procedure Code under which an application like this case can be maintained. I think this contention is valid. Under section 269 of Act VIII of 1859 a complaint made by the purchaser on account of resistance in obtaining delivery of possession of the purchased property, as well as a complaint made by a party other than the defendant, on the ground of

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dispossession in the delivery of possession to the purchaser, could be maintained and enquired into.

“But under the new Act of 1877 the former is maintainable under sections 334 and 335, but it is silent with reference to the latter. There is, therefore, no provision in the new Code giving a right to a person dispossessed in delivering possession to the purchaser of the purchased property, for an enquiry into his right. His remedy is by a regular suit. It is contended on behalf of the applicant that, if a party, other than the defendant, dispossessed in delivering possession to a decree-holder of the decretal property, can have a summary remedy, it is anomalous to think that a party other than the defendant can have no such remedy when he is dispossessed by a purchaser at an execution sale. I think this plea is quite fallacious. In the first place, there is an express provision with regard to the first-mentioned point, section 332, but there is none with reference to the last-mentioned one. In the next place, in the former case the dispute is between the decree-holder, a party to a pending case and another, which if not adjudicated upon, justice cannot be attained, while in the latter case the dispute is between two strangers, quite unconnected with the case in which the decree was passed or with the execution thereof. It is reasonable, therefore, that such parties should be left to settle their dispute in a case between themselves, and that the Court executing the decree should not be encumbered to try a point foreign to the execution proceedings and without a case to that effect.

“The applicant’s pleader then pointed out to use article 167 of second schedule, third division of the Limitation Act, and argued that, unless an application of the present nature was maintainable, the limitation for such an application would not have been provided for in the Limitation Act. The article under notice runs thus: “Complaining of resistances to delivery of possession of immoveable property decreed or sold in execution of a decree, or of dispossession in the delivery of possession to the decree-holder or the purchaser of such property.” I must confess I do not find my way clear to reconcile this provision with the provisions of the Civil Procedure Code. My query, therefore, is whether the present application is maintainable in the execution department, or the applicant should be told to seek remedy in regular course of law.

I reserve judgment in the matter until receipt of the Court's decision on the points."

The decision of the High Court (1) on the reference submitted is as follows :—

The Subordinate Judge seems to have correctly explained the present state of the law. If the purchaser at a sale in execution of a decree be resisted or obstructed when being put in possession by the Court as provided for by section 318 or section 319 of the Code of Civil Procedure, Act X of 1877, the Court can now act only under section 334 or section 335. Section 318 provides for the giving of what is usually termed *khas* possession to an execution-purchaser, and the Court is empowered to "order delivery to be made by putting the purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property; and, if need be, by removing any person who refuses to vacate the same." If resistance or obstruction is made by the judgment-debtor or any one on his behalf, the provisions of Chapter XIX of the Code relating to resistance or obstruction to a decree-holder are applicable to section 334. If, on the other hand, the property sold was not in the *khas* possession of the judgment-debtor, but is in the occupancy of a tenant or other person entitled to occupy the same, possession by publication of his title is given to the execution-purchaser; and section 334 provides for a summary enquiry on resistance or obstruction caused by "any person other than the judgment-debtor, not in possession of the property sold, but claiming a right thereto as proprietor, mortgagee, lessee, vendee, any other title," if such resistance or obstruction be made the subject of complaint by the purchaser.

No provision is, however, now made if the obstruction or resistance to the possession of an execution-purchaser is caused by a third party, a stranger claiming to be in actual possession on a title altogether independent of the judgment-debtor. Section 331 provides for such a case, but only when possession is being given to a decree-holder in execution of a decree, and this does not apply to an execution-purchaser. Section 269 of the Code of 1859 provided for this case, and we do not understand why it has

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(1) MARKEY and PRINSEP, J.J.

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been omitted from the present Code of 1877; this omission is the more remarkable, because the law of limitation, passed almost simultaneously with the present Code, in Sch. II, Art. 165, seems to contemplate a summary enquiry by the Courts on the application by a person "dispossessed of immoveable property and disputing the right of the purchaser at a sale in execution of a decree to be put in possession," since it provides a term within which such an application by such a person for redress should be made.

In such a state of the law it seems obviously unfair for the Courts which cannot now summarily determine the relative rights of the parties to insist on putting an execution-purchaser into possession in spite of the resistance or obstruction of a third party having no connection with the judgment-debtor; and therefore it seems to us that ordinarily officers should be directed to abstain from any act of dispossession in such a case, leaving the execution-purchaser to his remedy by suit.

[CRIMINAL APPELLATE JURISDICTION.]

KALEE BEPAREE AND OTHERS APPELLANTS.

1878
March 5.*Rioting—Attacking party—Right of private defence.*

Where both parties are armed and prepared to fight, it is immaterial who is the first to attack, unless it is shown that that party was acting within the legal limits of the right of private defence.

CRIMINAL APPEAL from an order of the Sessions Judge of Backerganj, convicting and sentencing the appellants on a charge of rioting, armed with deadly weapons, under section 148 of the Indian Penal Code.

Baboo *Doorga Mohun Dass* for the Appellants.

The facts of this case are sufficiently set forth in the judgment of the High Court (1) which was delivered by

JACKSON, J. :—

JACKSON, J.

The case against the prisoners, appellants, was that they had been respectively concerned in an affray in which a person named Rohimooddeen was wounded with a spear and killed, and they were charged under sections 302 and 149 of the Penal Code; but, in consequence of the evidence, which, in the opinion of the Court of Session, was not sufficiently strong to support a conviction on those counts, they were convicted only under section 148 of the Penal Code, of rioting armed with deadly weapons, and sentenced, each of them, to rigorous imprisonment for three years.

It is contended for the appellants that in the condition of the evidence given before the Court of Session, the appellants ought not to have been convicted at all; and it is pressed upon us that the Judge has altogether disbelieved most of the witnesses for the prosecution, and that he relies entirely upon a single witness, named Gholam Nubi, who, however, has not adhered to the same story throughout, but has contradicted himself; and it is contended that he therefore ought not to be believed. Now, it seems to us that the appellants' pleader is mistaken as to the

(1) JACKSON and CUNNINGHAM, J.J.

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JACKSON, J.

view taken by the Judge of the evidence for the prosecution generally. I do not understand that the Judge altogether disbelieves and rejects that evidence, but that he disbelieves it in so far as it gives colour to the case which would establish aggression and guilt on the part of one of the contending parties only and the entire innocence of the other. In that respect the Judge certainly does not believe the evidence, and I see very little reason to doubt that the Judge is right. There is good reason to believe, that on both sides there was irritation and also determination to resort to force to support the rights and wishes of the parties, and the Judge expressly says that it appears from the evidence (and it must be taken therefore that he believes it in that respect) that there had been preparation on both sides for an armed encounter. It is not denied that the evidence of the witnesses generally goes to show that these four persons were engaged in the encounter which resulted in the death of Rohimooddeen. As to the evidence of Gholam Nubi, the Judge expressly says that he came into the box with the determination of suppressing circumstances which would tell against his own landlord, but that being pressed, he was compelled to admit the whole truth, and, therefore, did admit that on the side of the landlord as well as on the side of the confederate ryots there was use of force, and consequently mutual affray. He expressly says that these four persons were engaged in the affray, and I do not find that the cross-examination which followed was at all directed to show that his statement in that respect was untrue. The appellant's pleader, I have no doubt, had good reasons for not laying before us the defence raised in favour of the prisoners; and it is obvious that what they really sought to do was not so much to show they were entirely free from blame or were not present on that occasion, but merely that they were not the attacking party. That, under the circumstances of this case, makes no difference, because it is not attempted to show that they were acting within the legal limits of the right of private defence; and it does not matter, where both parties are armed and prepared for battle, which is the first to attack. Both sides are equally culpable. I therefore think that this appeal must fail.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF UJJALA BEWA.

1878
March 12.

*Code of Criminal Procedure, section 142—Indian Penal Code, Chapter XX,
section 494—Jurisdiction—Complaint.*

A complaint was made to a Magistrate accusing a certain person of having taken or kept the wife of the complainant. In the course of the proceedings it appeared that the wife had committed bigamy (section 494, Indian Penal Code). The Magistrate without a further complaint committed the woman alone for trial by the Court of Session.

Held, that the Magistrate had acted within his jurisdiction ; section 142 of the Code of Criminal Procedure being designed to prevent a Magistrate from inquiring without complaint into a case connected with marriage ; but, when a case is properly before the Magistrate, he may proceed against any person implicated.

THIS was a case called for by the High Court, as a Court of Revision, on perusal of the statements submitted by the Sessions Judge of Jessore at the close of the January Sessions.

The facts are sufficiently set forth in the judgment of the High Court (1) which was delivered by

JACKSON, J. :—

JACKSON, J.

Ujjala Bewa was put on her trial before the Court of Session upon a charge framed under section 494, Indian Penal Code. The Sessions Judge stopped the case, being of opinion that the Magistrate's proceedings were illegal and the commitment invalid, inasmuch as, in his opinion, it did not appear that any complaint in the proper sense of the term was made by the prosecutor Bheem Chumar against Ujjala. It does not appear as a "complaint" in the proper sense of the term ; but we find, on looking to the witness before the Magistrate, that Bheem, in the first instance, lodged a complaint against one Khettra or Bhitton, apparently of taking or keeping his wife away from him. Ujjala being then in Court said that she was not married to the com-

(1) JACKSON and CUNNINGHAM, J.J.

1878
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UJJALA
BEWA.

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plainant. Whereupon the Magistrate made this order: "I adjourn this case to the 26th instant, when, if the complainant elects to proceed, he is to appear with his witnesses," and he warns the complainant of the danger of urging a false complaint.

The complainant evidently did elect to proceed, for on the 29th he was further examined, and then said (after again asserting his previous marriage to Ujjala), "I hear now that Ujjala has made nikah with Radin Chumar," and on the same date Ujjala was examined as a defendant. Evidence was gone into on that and following days, and on the 31st of July the complainant sought to give and did afterwards offer further evidence. The result was that in the Magistrate's opinion there was a good case against Ujjala, but not evidence to warrant the commitment of the man whom she subsequently married, as an abettor.

The Sessions Judge refers to section 142, Code of Criminal Procedure, which forbids a Magistrate to take cognizance of a case without complaint, when the offence falls (as here) under Chapter XX, Indian Penal Code. That provision is clearly designed to prevent Magistrates from inquiring of their own motion into cases connected with marriage, unless the husband or other person authorized moves them to do so; but apparently when the case is once properly before the Magistrate he may proceed against any person implicated. In the present instance, however, it is clear that the husband, or *soi disant* husband, not only brought the case before the Magistrate, but on its being set up that Ujjala had been married by nikah to another man, and after having an opportunity to consider, he chose to go on against her. The proceedings of the Magistrate, therefore, seem to have been in complete accordance with the law; we accordingly set aside the order of the Sessions Judge, and direct that the trial proceed.

[CIVIL APPELLATE JURISDICTION.]

ROY DHUNPUT SINGH BAHADUR . . DEFENDANT;

AND

BABOO LEKRAJ ROY PLAINTIFF.

1878
January 9.*Partnership Debts and separate Debts—Current Account—Limitation.*

Plaintiff had an account with a banking firm of which the defendant was a member. On the dissolution of this firm, plaintiff made up his accounts, debiting the defendant with a share of the amount due to him from the firm, and afterwards he carried on business with the plaintiff separately. It did not appear that any settlement had been made between the parties from the time of the dissolution of the firm down to the filing of the plaint, or that the defendant had assented to a portion of the firm's debt being carried to his separate account: *Held*, that the plaintiff could not recover this sum with interest, as an item of a mutual, open, and current account, where there had been cross-demands between the parties. (See Limitation Act, XV of 1877, Sch. II, cl. 85.)

SPECIAL APPEAL from a decree passed by the Judge of Purneah, reversing that of the Subordinate Judge of that district.

In this case it appeared that the defendant and his brother carried on a joint banking concern at Purneah up to the 10th of Assin Sooder 1917, Sumbut, during which they had dealings with the plaintiff's banking firm. On the date last mentioned the defendant separated from his brother, and thenceforward carried on business on his own account. At the time of the dissolution they owed plaintiff Rs. 530, half of which the plaintiff debited to the defendant and half to his brother. The plaintiff and the defendant continued their mutual dealings down to the filing of the plaint. These dealings were of the following nature: On the day in each year on which defendant opened new (*khatta*) books, the plaintiff used to send Rs. 51 to the defendant as mohoruth money; and on the day on which the plaintiff opened new (*khatta*) books the defendant would send to the plaintiff Rs. 51 as mohoruth money. Frequently the plaintiff borrowed money from the defendant, and the defendant from the plaintiff, but these loans were always repaid by the respective borrowers within a week. The

1878
 ~~~  
 ROY  
 DHUNPUT  
 SINGH  
 BAHADUR  
 v.  
 BABOO  
 LEKRAJ ROY.  
 ———  
*Judgment.*

books showed no settlement of accounts to have taken place at any time between the parties.

The plaintiff brought the present suit, for the Rs. 265 before mentioned and interest, together with various other sums, chiefly interest on the mohoruth money. The Court of First Instance dismissed the suit, but this decree was reversed on appeal. Defendant then brought this special appeal.

*Baboo Gooroo Dass Banerjea*, for the Appellant.

*Mr. R. E. Tvidale*, *Baboo Nil Madhub Sen*, and *Baboo Taruck Nath Palit*, for the Respondent.

The judgment of the Court (1) is as follows :—

We are obliged to hold in this case that the judgment of the lower Appellate Court is erroneous. The claim of the plaintiff was to recover Rs. 1,171 due under current *bahi khatta* (account books). Now this amount the plaintiff could only hope to recover if he sued within three years, as for the balance due on a mutual, open, and current account where there have been reciprocal demands between the parties; the three years being counted from the time of the last item admitted or proved in the account. Now it turns out that there has been no mutual, open, and current account between the parties. What the plaintiff relied upon as the commencement of the account was a sum of Rs. 265, debited by him to the defendant, being the balance of a previously outstanding account between him (plaintiff) and the defendant and his brother. That account appears to have been closed with a balance of Rs. 530 being found due from the two brothers; and the plaintiff, taking the half of that amount as due from the defendant, considers that to be an item due on a mutual, open, and current account, where there have been reciprocal demands between the parties.

We think the plaintiff was not at liberty to do any such thing. It appears that the whole, or nearly the whole, of the amount of which the total is said to be Rs. 1,103, consists of interest and compound interest upon this item so irregularly charged. In

(1) JACKSON and KENNEDY, J.J.

point of fact, as matters stood between the plaintiff and the defendant, all that the plaintiff could possibly recover by a suit against the defendant would be the amount of advance, if any, made by him to the defendant within three years before the commencement of the suit. It does not appear that there was any sum worth mentioning which was so advanced; and, therefore, the Subordinate Judge was right in dismissing this suit, and the Judge had no ground for reversing that judgment and giving the plaintiff a decree. The judgment of the lower Appellate Court is set aside with costs.

1878  
ROY  
DHUNPUT  
SINGH  
BAHADUR  
v.  
BABOO  
LEKRAJ ROY.  
*Judgment.*

## [CIVIL APPELLATE JURISDICTION.]

1878  
January 9.

SOLDAR MONDUL AND OTHERS . . . . . DEFENDANTS;  
AND  
NILCOMUL CHATTERJEA AND ANOTHER . . . PLAINTIFFS.

*Indian Evidence Act, section 116—Consent Decree for Arrears of Rent—Onus.*

Plaintiff alleged a purchase of land from A and B, that he afterwards granted them a pottah and retained them in possession, and he put in evidence a consent decree obtained against B for arrears of rent: *Held*, in a suit brought to recover possession on the ground of the tenancy having expired, that that decree worked no estoppel against B by virtue of section 116 of the Evidence Act, and did not relieve the plaintiff from the necessity of proving his case completely.

**SPECIAL APPEAL** from a decree passed by the Second Subordinate Judge of Nuddea, modifying that of the Moonsiff of Ranaghat.

This was a suit for possession. The plaintiff stated that he had purchased the land from the defendants and had granted them a pottah at a certain rate; and he put in a decree obtained against Soldar Mondul, one of the defendants, in the year 1872. The plaintiff failed to produce any reliable evidence in support of his case, except this decree, which the lower Court thought conclusive against Soldar, and gave a decree against him alone. Soldar then brought this special appeal.

Baboo Aubinash Chunder Banerjea, for Appellant.

Baboo Nulit Chunder Sen, for Respondent.

The following judgments were delivered by the Court: (1)—

BIRCH, J. BIRCH, J. :—

In this case the Moonsiff dismissed the suit on the ground that the plaintiffs' case had not been satisfactorily proved. In appeal to the Subordinate Judge, he seems to have raised for himself

(1) BIRCH and MITTER, J.J.

a point which was not suggested in 'the pleadings, and which we think should not have been raised. He held that, by section 116 of the Evidence Act, Soldar is estopped from denying the plaintiffs' title. All that he had upon the record, upon which to base this conclusion, was a decree obtained by the plaintiffs against Soldar on confession. It is suggested here that what the Subordinate Judge means is that Soldar's admission in the former suit is binding upon him in the present suit, but that is not what the Subordinate Judge says. He merely says that Soldar is estopped by section 116 from denying the plaintiffs' title. That section cannot apply in this case. The point for trial was a very simple one, and it was whether the plaintiffs' allegation of purchase from the father and uncle of Soldar was true or not. The Moonsiff found that it was not true, and he accordingly dismissed the suit. The Subordinate Judge does not seem to dissent from this finding, and the only course for him in such a view of the case was to dismiss the appeal.

The result, therefore, is that the decision of the Subordinate Judge awarding an eight-annas share of the tenure to the plaintiffs will be set aside, and the judgment of the Moonsiff dismissing the plaintiffs' suit with costs will be restored. The appellant is entitled to the costs of this appeal.

MITTER, J. :—

I am also of the same opinion. I do not think that the Subordinate Judge is right in holding that in this case the defendant is estopped under the provisions of section 116 of the Evidence Act from alleging that the plaintiffs have no title. That section enacts: "No tenant of immoveable property or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immoveable property." Before this section could be applied, it was necessary for the Subordinate Judge to find that the defendant Soldar was a tenant of the plaintiffs. This fact was disputed by the defendant Soldar. The Moonsiff found in favour of the defendant upon this question. I do not find that the Subordinate Judge has come to a contrary finding with reference to it. It

1878  
SOLDAR  
MONDOL  
AND OTHERS  
v.  
NILCOMUL  
CHATTERJEA  
AND ANOTHER.  
Judgment.  
BIRCH, J.

MITTER, J.



1878

SOLDAR  
MONDUL  
AND OTHERS  
v.  
NILCOMUL  
CHATTERJEA  
AND ANOTHER.

*Judgment.*

MITTER, J.

is true that the Subordinate Judge could, if he was satisfied upon the evidence, find that Soldar was really a tenant of the plaintiffs'. No doubt the decree to which he refers would be evidence upon that point, but that decree is not conclusive evidence; and as the Subordinate Judge has not come to a clear finding upon that point, namely, that Soldar was a tenant of the plaintiffs', I do not think that he was right in applying the provisions of that section against the defendant. It further appears to me that the plaintiffs admits in their plaint that the defendant Soldar is no longer their tenant. It is upon that fact that they bring this suit to recover possession of the land. Therefore, it is clear, that if there had been at any time a tenancy it was put an end to before the suit was brought, and therefore section 116 cannot apply, as it enacts that a tenant during the continuance of the tenancy is not to be permitted to deny his landlord's title. I am, therefore, of opinion that the Moonsaiff's judgment is correct, and that judgment ought to be restored with costs.

## [CIVIL APPELLATE JURISDICTION.]

MOHENDRO NATH MUKERJEA . . . DEFENDANT ;

AND

NAFUR CHUNDER PAL CHOWDHRY } PLAINTIFFS.  
AND ANOTHER . . . . . }1878  
January 9.*Adverse Possession—Limitation—Res Judicata.*

A took and held possession of land adversely to B, and afterwards let it in patni to C. B brought a suit for possession against A; and, having obtained a decree, attempted to execute it by turning C out of possession. Between the date on which A originally took adverse possession of the land, and the date on which B attempted to turn C out of possession, more than twelve years elapsed.

*Held*, that B's claim against C was barred by limitation; and that C was not bound by the decree obtained by B against A, not having been made a party to the suit.

**S**PECIAL APPEAL from a decree passed by the Judge of Nuddea, affirming that of the Officiating Subordinate Judge of that district.

The defendants, who were possessed of two properties, X and Y, alleged that one Shakhimoni, (their aunt) in execution of a decree against them, brought to sale and purchased X on the 6th of December 1858; but that under that purchase she took and held possession of X and of Y as part of X. In 1859, Shakhimoni let out Y in *ijara* to the plaintiffs' father, and afterwards granted it in patni to the plaintiffs on the 25th of September 1867. Defendants, on the 5th of December 1870, brought a suit for possession of Y against Shakhimoni, and having obtained a decree, they were placed in possession of Y on the 31st of January 1874. The plaintiffs intervened under section 230, Act VIII of 1859, setting out the circumstances above mentioned.

The Court of First Instance gave plaintiffs a decree on the grounds (1) that the plaintiffs had held possession adversely to the defendants for more than twelve years; (2) that the defendant's decree against Shakhimoni had been obtained by fraud and

1878  
 MOHENDRO  
 NATH  
 MUKERJEA  
 v.  
 NAFUR  
 CHUNDER  
 PAL  
 CHOWDHRY  
 AND ANOTHER.

—  
*Judgment.*  
 —

collusion ; (3) that even if it had been obtained *bonâ fide*, it would not bind the plaintiffs who were patnidars in possession, because they had not been made parties to the suit. Defendants appealed, but the appeal was dismissed ; they then brought this special appeal.

Baboo *Ashutosh Mukerjea* and Baboo *Doorga Doss Dutt*, for Appellants.

Baboo *Srinath Doss*, Baboo *Rash Behary Ghose*, and Baboo *Bipro Das Mukerjea*, for Respondents.

The judgment of the Court (1) is as follows :—

The facts, about which there is no dispute in this case, are these : Under the purchase in the execution of a decree against the defendants in this case, one Shakhimoni obtained possession of the land in dispute, on the 22nd of Aghran 1265. From that date to the 10th of Assin 1274, Shakhimoni remained in possession, collecting rent, either directly from the tenants, or through the plaintiffs in this case, as her *ijardars*. On the 10th of Assin 1274, she granted a patni of the said land to the plaintiffs, and from that date to Magh 1280, the plaintiffs were in possession as patnidars. In the meantime, that is to say, in the year 1277, the defendants brought a suit against Shakhimoni alone, to recover possession of the land in suit, on the ground that Shakhimoni had not acquired a valid title to it under her purchase. That suit was decreed in the year 1872 [or 1279]. In execution of that decree the defendants, who were the plaintiffs and decree-holders in that case, applied to recover *khas* possession of this property from the hands of the plaintiffs ; and the plaintiffs have brought this suit under the provisions of section 230 of Act VIII of 1859, to be maintained in their possession. These are the admitted facts in the case. It has also been found upon evidence, which finding cannot be impeached in special appeal, that at the time when the defendants brought their suit against Shakhimoni they were fully aware and cognizant of the fact that the lands in suit were in the possession of the plaintiffs as patnidars ; and notwithstanding that know-

(1) KEMP and MITTER, J.J.

ledge, they chose to bring their suit for possession against Shakhimoni alone. Under the circumstances of this case, it seems to us that plaintiffs are entitled to a decree for possession, unless the defendants can show, not only that they had title to this property some time previously, but that that title is still subsisting and not barred by limitation. It seems to us clear that the defendants ought not to be allowed to occupy any position higher than what they would have done if they had brought a suit against the patnidars also, who are the special appellants before us. That being so, upon the admitted facts it is quite clear that the defendants are out of Court, because the property in dispute has been in the possession either of Shakhimoni or of the plaintiffs from the year 1265 to the year 1280. Therefore we think that the plaintiffs' suit was rightly decreed.

It only remains for us to notice the first ground of special appeal, viz., that the decree which was awarded in favour of the defendants against Shakhimoni operates as a *res judicata* against the plaintiffs. We think that the decision of the lower Courts upon this point is perfectly correct. The plaintiffs derive their title under the patni lease executed prior to the institution of that suit, and, therefore, they are not barred by the decree which was passed in it. We think that this special appeal should be dismissed with costs.

1878

MOHENDRO  
NATH  
MUKERJEA

v.  
NAFUR  
CHUNDER  
PAL  
CHOWDREY  
AND ANOTHER.

—  
Judgment.  
—

## [CIVIL APPELLATE JURISDICTION.]

1878  
January 10.

NOBO KISHORE DASS AND ANOTHER . PETITIONERS ;

AND

|                             |   |                 |
|-----------------------------|---|-----------------|
| PROTAP CHUNDER BANERJEA AND | } | OPPOSITE PARTY. |
| ANOTHER . . . . .           |   |                 |

*Act VIII of 1859, section 270—Decree of Subordinate Court—Execution.*

A decree was passed by the Subordinate Judge, and in execution of that decree, a sale of certain property was held and conducted by the Nazir of the District Judge: *Held*, that, in reference to that sale, the District Judge had no jurisdiction to pass any order under the provisions of section 270, or any order respecting the re-sale of the property.

**R**ULE to show cause why an order passed by the District Judge of Bhaugulpore should not be set aside as passed without jurisdiction.

Baboo *Bama Churn Banerjea*, for Appellants.

Baboo *Chunder Madhub Ghose* and Baboo *Sri Nath Banerjea*, for Respondents.

The facts of the case are sufficiently set forth in the judgments delivered by the High Court (1), which are as follows :—

KEMP, J. KEMP, J. :—

The petitioners obtained a rule on the 18th September last, calling upon the opposite side to show cause why the order of the District Judge of Bhaugulpore, dated the 29th August 1877, directing the property to be put up to sale, should not be set aside. In the meantime the sale was stayed and the money allowed to remain in Court. This order was passed by Justices WHITE and McDONELL. The case has come before us to-day, and has been argued at length.

It appears that Nobo Kishore Dass and Kristo Gobind Dass obtained a decree against Juggut Chunder Roy on the 26th February 1877, in the Court of the Subordinate Judge of

(1) KEMP and MORRIS, J.J.

Rungpore. The decree directed that the amount of the decree should be realized by sale of the mortgaged property, Talook Holdibaree. Accordingly, that property, in execution of that decree, was put up for sale on the 4th July 1877, and was purchased by the decree-holders for Rs. 9,326. The decree-holders put in an acquittance for the amount covered by their decree, and the balance of the purchase-money was admittedly paid in on the 15th day after the sale. Subsequently, the opposite party, who had obtained a decree in the Court of the Subordinate Judge of Rajshahye, applied to the Judge of Rungpore (to whom copy of the decree had been sent for execution) asking that the property should be sold in satisfaction of their decree. The Judge of Rungpore refused this application; but, finding that the applicant had been the first to attach the property, he passed an order under section 270 of the Civil Procedure Code, Act VIII of 1859, that the applicant should be paid first out of the proceeds of the sale held in execution of the decree of Nobo Kishore Dass and Kristo Gobind Dass; and, further, that the said Nobo Kishore Dass and Kristo Gobind Dass, in lieu of an acquittance receipt for Rs. 3,715-10-9, should pay in that amount in cash. Subsequently, on the 29th August 1877, on the failure of Nobo Kishore Dass and Kristo Gobind Dass to pay the money, he directed that the property should be re-sold.

The present application is, therefore, made to us to set aside both the orders of the Judge of Rungpore, dated respectively the 30th of July and 29th of August 1877, as being passed without jurisdiction. We are clearly of opinion that this rule must be made absolute. The Judge has, in our opinion, acted entirely without jurisdiction in this matter. The decree was passed by the Subordinate Judge of Rungpore; and, in execution of that decree, the sale was held and conducted by the Nazir of the District Judge. In reference to that sale the District Judge had no jurisdiction to pass any order under the provisions of section 270, or any order respecting the re-sale of this property. The Subordinate Judge alone had jurisdiction in this matter; and the opposite party ought to have proceeded by petition to the Subordinate Judge, under the provisions of section 270, if they had any claim to priority in the matter of the disposal of the

1878  
 NOBO  
 KISHORE  
 DASS  
 AND ANOTHER  
 v.  
 PROTAP  
 CHUNDER  
 BANERJEE  
 AND ANOTHER.  
 Judgment.  
 KEMP, J.

1878  
 NOBO  
 KISHORE  
 DASS  
 AND ANOTHER  
 v.

PROTAP  
 CHUNDER  
 BANERJEA  
 AND ANOTHER.

*Judgment.*

KEMP, J.

sale proceeds owing to their having caused a prior attachment to be made.

The Judge, in his order of the 29th of August 1877, admits that he verbally directed the Nazir of his Court to accept an acquittance for the amount covered by the decree as part payment of the sale proceeds. After this, the balance of the sale proceeds was paid in on the 15th day by the petitioners. Eleven days after, the Judge, finding that he had committed an error, in ignorance, as he says, of the rights of the opposite party, passed the order, dated the 30th of July, under the provisions of section 270, and subsequently the order of the 29th August directing the re-sale of the property.

We are of opinion that the two orders, viz., the order under section 270, and the order directing the re-sale of this property were passed without jurisdiction. We accordingly set aside these two orders and make the rule absolute with costs.

MORRIS, J. MORRIS, J. :—

I concur. I would only add that the High Court Circular Order, referred to by the Judge, clearly does not give him jurisdiction to interfere, as he has done here, and to assume the functions of the Court whose duty it is to execute the decree.

## [CIVIL APPELLATE JURISDICTION.]

MUSSAMAT BEEBEE GOLABJAN AND } PLAINTIFFS; 1878  
 OTHERS . . . . . } January 10.

AND

SHAIKH MASHIATOO LAH AND OTHERS . . DEFENDANTS.

*Possession—Share of undivided tenure—Separate Receipts.*

The co-sharers in a certain jote, who were ryots having a right of occupancy, paid their rents separately to the patnidars, who gave each party a separate receipt for his "share of the undivided tenure." One of the ryots, who alleged that he had been dispossessed, brought a suit to recover possession of his separate share of the jote against the other co-sharers and the patnidars, and put the receipts in evidence to show that the patnidars had consented to the jote being divided and held in separate shares: *Held*, that they were insufficient to do so; and that the suit could not be maintained in its present form.

**SPECIAL APPEAL** from a decree passed by the Judge of Purneah, reversing that of the Moonsiff of Kishengunje.

Baboo *Taruk Nath Palit*, for the Appellants.

Baboo *Gopal Lall Mitter*, for the Respondents.

The facts of the case are sufficiently set forth in the judgment of the Court (1), which was delivered by

JACKSON, J. :—

JACKSON, J.

It seems to me, regard being had to the finding which the Judge has arrived at, that this suit must be necessarily dismissed. What the plaintiffs asked for was the recovery of possession by adjudication of right in respect of 26 beeghas, and 5 cottahs of *mal* land. They stated that a jote of ryotti lands, covering 105 beeghas, had been formerly held by the common ancestor of themselves, of the second parties defendants, and of the third parties defendants; and that subsequently, the lands in suit, forming a 4-annas share of the jote, devolved upon the plaintiffs' ancestor,

(1) JACKSON and McDONELL, J.J.



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MUSSAMAT  
BEEBEE  
GOLABJAN  
AND OTHERS  
v.

SHAIKH  
MASHIAH  
TOOLAH  
AND OTHERS.

*Judgment.*

JACKSON, J.

and other shares on the other parties above named; that having divided the property, they continued in possession of their respective shares as *nij abadi* and habitation lands; that the first defendants having got a patni, they, viz., the plaintiffs, separately paid rent under receipts, according to the previous partition; and after that, the first defendants, in collusion with the second defendants, with a view to disturb the old jumma and the mokurari occupancy of the plaintiffs, and of the second and third defendants, forcibly dispossessed the plaintiffs.

Of course, to support that case, the plaintiff would have to prove that, subsequently to the original grant of 105 beeghas, those whom the plaintiffs represent and those whom the second and third defendants represent had made a division, whereby the plaintiffs came into separate possession of the 26 beeghas and 5 cottahs which they claim; and also that they had separately occupied that quantity of land with the consent of the proprietor, to whom they paid their separate quota of the rent of the land; and that afterwards the patnidars, in collusion with the other defendants, had dispossessed them. Now, the Judge finds, as an absolute finding of fact, that no division of the land has ever been in any way recognized by the zemindar or any person representing him; and, further, that the only settlement to which the zemindar and patnidars were in any way parties, was a joint settlement of some kind for the whole of the 105 beeghas; and that the dakhillas proved to have been given by the proprietor were dakhillas in respect of a joint undivided share. That being so, the suit, as it was framed, against the patnidars and the other defendants could not be maintained. Of course, the plaintiffs might have their suit against their co-sharers to recover their share of the joint holding, but that would be entirely a different suit from the present; and the suit now brought by the plaintiffs cannot be converted into any such suit. The special appeal must be dismissed with costs

## [CIVIL APPELLATE JURISDICTION.]

SHIB NARAIN SHAHA . . . . . DECREE-HOLDER;

AND

BEEPIN BEHARI BISWAS . . . . . JUDGMENT-DEBTOR.

1878  
January 19.*Execution of decree passed by another Court—Transfer to third Court for Execution—Jurisdiction—Procedure—Act VIII of 1859, sections 285, 286, 290.*

A decree obtained in the Court at X was transferred for execution to the Court at Y, where, after some time, the case was struck off the file. The decree-holder subsequently applied in Y to have the case sent for execution to the Court at Z : *Held*, that the Y Court had no jurisdiction to grant the application; that the proper course for the decree-holder to pursue was to apply under section 290, Act VIII of 1859 to the Court where the decree was obtained originally, for a fresh certificate of transfer to the third Court.

*Bagram vs. Wise*, 10 W. R., 46, distinguished.

**S**PECIAL APPEAL from an order passed by the Judge of Julpigooree, affirming that of the Sudder Moonsiff of that district.

Baboo *Nogendro Nath Roy*, for Appellant.

The Respondent did not appear.

The facts of the case are sufficiently set forth in the judgment of the Court (1), which is as follows :—

The original decree in this case is dated the 31st December 1862, and was passed by the Sudder Moonsiff of Rungpore. On the 22nd February 1872, the case was transferred to the Moonsiff of Julpigooree for execution, and was struck off by that Moonsiff on the 21st of March 1874.

The present application was made to the Moonsiff of Julpigooree on the 21st April 1876, for a certificate to enable the judgment-creditor to execute the original decree of 1862. The Moonsiff held that under clause 167 of the second schedule of the Limitation Act, IX of 1871, this application ought to have been filed

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within three years from the date of the last application for execution, or from the date of issue of notice under section 216 of the Code of Civil Procedure; and that, as it was not filed within that period, it was barred by limitation.

On appeal, the District Judge held that the Moonsiff was not competent to enter into the question as to whether the application was barred or not, inasmuch as the case had been struck off the file on the 21st March 1874. In support of this finding the Judge quotes the case of *Brojendro Narain Roy vs. Binode Ram Sen*, 11 W. R., 269; but the Judge says that the Moonsiff came to a right conclusion in rejecting the application, inasmuch as it was one which ought never to have been presented. The application was for issue of a certificate for execution by the Moonsiff of Azimgunge.

The Judge held that the petitioner, the appellant before us, ought to have applied to the Moonsiff of Rungpore, and not to the Moonsiff of Julpigooree, as he had done in this case.

The pleader for the special appellant refers to the Full Bench Ruling in 10 W. R., 46—*Bagram vs. Wise*, and contends that the finding of the Judge is wrong. In that case the late learned Chief Justice Sir BARNES PEACOCK, who delivered the judgment of the Full Bench, remarked that, “as soon as a copy of the decree, which is sent for execution to another Court, is filed in the Court to which it is transmitted, it has the same effect as a decree of that Court, and that Court, that is to say, the Court to which the decree is transmitted, is to proceed to execute it according to its own rules in the like case.” No doubt, the Moonsiff of Julpigooree had authority, and was competent to execute a decree of the Moonsiff of Rungpore that was transmitted to him, provided he had jurisdiction; but this is a case which, in our opinion, is not covered by the decision of the Full Bench quoted above. This was an application to the Moonsiff of Julpigooree, not to execute the original decree passed by the Moonsiff of Rungpore, but to take proceedings in execution upon his copy decree and order, as provided in sections 285 and 286 of the Civil Procedure Code, within the jurisdiction of another Moonsiff, viz., that of Azimgunge. Clearly it was beyond the scope of the instructions conveyed to the Moonsiff of Julpigooree, and outside his juris-

diction, to grant a certificate for this purpose. Moreover, as the execution case had been already struck off his file by him, the appellant before us ought to have applied under section 290 to the Sudder Moonsiff of Rungpore, who passed the original decree of the 31st December 1862, for the issue of a fresh certificate.

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We, therefore, dismiss this appeal, but without costs, as no one appears for the respondent.

*Judgment.*

## [CIVIL APPELLATE JURISDICTION.]

1878  
January 18.

RAM CHUNDER HALDAR AND OTHERS . . DEFENDANTS;  
AND  
GOBIND CHUNDER SEN AND ANOTHER . . PLAINTIFFS.

*Secondary Evidence—Proof of Title—Unregistered Deed of Sale.*

Plaintiff alleged that A and B had sold and conveyed, by an unregistered deed, certain land to the person under whom he claimed. The deed being inadmissible in evidence, B was called to prove the sale: *Held*, that B's evidence should have been rejected, as secondary evidence of the unregistered deed could not be received.

**S**PECIAL APPEAL from a decree passed by the Second Subordinate Judge of 24-Pergunnahs, modifying that of the Second Moonsiff of Diamond Harbour.

The position of the parties in this case, which was a suit for possession, is as follows: Plaintiff alleged that on the 21st of June 1867, Bheem Goledar and Nobokisto Goledar, the then owners, sold the land in dispute under an unregistered *kobala* to one Kally Coomar, who sold it to plaintiff under a registered *kobala*, on the 1st of April 1876. Defendant, who was in possession, alleged that he purchased the land from the abovenamed proprietors, under an oral contract, in the year 1867. The remaining facts are sufficiently set forth in the judgment of Mr. Justice WHITE.

Baboo Gopee Nath Mookerjee, for Appellant.

Baboo Opendro Chunder Bose, for Respondent.

The following judgments were delivered by the High Court (1):—

WHITE, J. WHITE, J.:—

This special appeal comes before us with respect to the claim made by the plaintiff to seven beeghas of land, being a portion of a larger amount of land sought to be recovered in this suit, and the point urged on behalf of the special appellant (who

(1) WHITE and MITTER, J.J.

is the defendant below) is that the plaintiff has failed to establish his title to these seven beeghas of land. The defendant is admittedly in possession of these seven beeghas, and he can, therefore, only be ousted by this suit upon proof of title in the plaintiff.

The plaintiff proves that he purchased the land from one Kally Coomar, who executed to him a deed of sale in the year 1875; but to make out his title, it is necessary for him further to show that Kally Coomar was at that time the owner of the land. But this he is unable to do. It is alleged by the plaintiff that Kally Coomar had purchased the land in 1867 from Bheem Goledar and his son Nobo Coomar Goledar, who are admitted by the defendants to have been the owners of the property at that time, and that a deed of sale was executed by the latter to Kally Coomar. That deed of sale has not been produced, and if it had been produced, could not have been received in evidence; because it was a document which required registration, and had not been registered. It is sought to bridge over the difficulty by the oral evidence of Nobo Coomar Goledar, who appears to be the survivor of the two parties who are alleged to have executed the deed of sale of 1867. Nobo Coomar was called as a witness for plaintiff, and stated to the effect that he and his father had sold the property to Kally Coomar. Nobo Coomar's statement, which is incorrectly described as an admission, in the judgment appealed against, is not receivable in evidence as the plaintiff is not in a position to give secondary evidence of the contents of the unregistered deed of sale.

Nobo's statement being, therefore, rejected as inadmissible, the only other way in which plaintiff could show that he had acquired a valid title from Kally Coomar would be by proving that Kally Coomar had been in possession of this property for a period of twelve years before he sold it to the plaintiff. It does not appear from the evidence in the case that Kally Coomar ever was in possession of this property; but assuming that he was so, his possession at the time of his transferring the land to the plaintiff could at most only be a possession for eight years, which is not sufficient to create a title in favour of Kally Coomar by length of enjoyment. The plaintiff, therefore, stands upon the evidence in

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*Judgment.*

WHITE, J.

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 ~~~~~  
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the position of a party who has never himself been in possession of the land, and who has purchased it from a person who had no valid title to the land when he effected the sale. Consequently the plaintiff, being unable to show a valid title to the property, is not in a position to oust the defendant. We, accordingly, reverse the decree of the lower Appellate Court, and dismiss the plaintiffs' suit with costs in all the Courts.

Judgment.

MITTER, J.

MITTER, J.:—

I concur in this judgment. I desire only to add that in this case the lower Appellate Court does not find that Kally Coomar was in possession for a single day. I do not, therefore, wish to express any opinion upon the question whether Kally Coomar, if he had been in possession for eight years, could have conferred a valid title by a deed of sale executed in favour of the plaintiff, although the deed of sale, by which he acquired the property, was not registered. It is not necessary to consider that question, because the lower Appellate Court finds that Kally Coomar was not in possession of this property.

[CIVIL APPELLATE JURISDICTION.]

CHUNDER SIKHUR BISWAS AND OTHERS . DEFENDANTS;

AND

RAM BUKSH CHETLUNGEE PLAINTIFF.

1878
January 18.*Partnership—Benamsee partner lending money to the Concern—Creditor's Suit.*

A was a partner in an indigo concern in the name of his son. In his own name A lent moneys to the concern for the purpose of carrying on the business, and each partner was to be separately liable for the moneys advanced in proportion to his share in the concern. In a suit against one of the partners for his proportion of the moneys so lent: *Held*, that plaintiff could not sue for those moneys on the footing of a mere creditor, and that the suit should be so framed as to determine the profits or losses of the concern, and whether any and what assets would be available to each partner to liquidate the loan in proportion to his share.

SPECIAL APPEAL from a decree passed by the Judge of Nuddea, affirming that of the Officiating Subordinate Judge of that district.

The defendants entered into a partnership business, under an ekrar, dated the 1st of March 1871, to carry on an indigo factory. The capital was to be borrowed from the plaintiff, and each partner made himself separately liable for the loans in proportion to his share in the concern.

The plaintiff himself was a partner, *benamsee*, in the name of his son, but the loans were to be made and were made by him in his own name, at different times up to October 1871, when the business came to an end. All the partners paid their proportions of the loan except Chunder Sikhur Biswas, against whom the present suit was brought; the other parties being made *pro forma* defendants.

Baboo *Ashotosh Dhur* and Baboo *Bipradas Mookerjee*, for the Appellant.

Baboo *Gooroodass Banerjee*, for Respondent.

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The judgment of the High Court (1) is as follows :—

The defendant, Chunder Sikhur Biswas, is the special appellant. He was the defendant No. 1 in the Court below. The suit was to recover Rs. 518-10 from this defendant. The plaintiff alleges that under the terms of an ekrar, dated the 18th Falgoon 1277, the defendant was liable for this sum which was advanced for the purpose of carrying on an indigo factory from the 24th Falgoon 1277 to the 15th Magh 1278. The defence amongst other points raised the following question, namely, whether the plaintiff, being a *benamee* partner in the concern, could recover the money claimed by instituting a suit, without an adjustment of account as regards receipts and disbursements, profits and losses, and the articles in store in connection with the indigo business being made. Both Courts have held that there can be no doubt that the plaintiff was a partner in this indigo concern *benamee* in the name of his son, but they say that, inasmuch as the plaintiff has brought this suit in his capacity of a money-lender and not in his capacity of a partner, he can recover the money claimed from the defendant in proportion to the $1\frac{1}{2}$ anna share of the defendant in the indigo concern, without suing him for an adjustment of account.

We are of opinion that these decisions are wrong in law. The moneys borrowed from the plaintiffs were moneys taken for the purpose of carrying on the partnership business. Any sums thus borrowed became partnership property, and the share of each partner in such partnership property can only be ascertained by taking an account. This account would show the profits and losses of the concern and so determine whether any and what assets were available to each partner to liquidate the loan in the proportion of his share. We think, therefore, that in its present form the suit is not correctly brought, and that it should have been dismissed, leaving the plaintiff to such remedy as he might have in the shape of a suit for adjustment of accounts. The special appeal will be decreed, and the plaintiff's suit dismissed with all costs.

(1) KEMP and MORRIS, J.J.

[CIVIL APPELLATE JURISDICTION.]

SURJO NARAIN GHOSE AND OTHERS. . . . PLAINTIFFS;

AND

HURRI NARAIN MOLLO AND OTHERS . . . DEFENDANTS.

1878
January 18.*Kabuliat—Counterpart—Indian Evidence Act I of 1872, section 63—
Secondary Evidence.*

A let lands to B, who sub-let to C, a ryot. C sued for possession of part, after an alleged dispossession, making A a party defendant to the suit. At the hearing, C, in order to prove that the lands in dispute were part of those let to him by B, tendered in evidence the kabuliat given by him to B: *Held*, that C should have produced the pottah given him by B, and the grant from A to B, or sufficiently account for their absence; and that, as he did not do either, the kabuliat (which was merely secondary evidence of C's pottah) was inadmissible, even though it was produced from the possession of the landlord A.

SPECIAL APPEAL from a decree passed by the Judge of Zillah West Burdwan, affirming that of the Moonsiff of Bishenpore.

Baboo *Rash Beharee Ghose*, for Appellants.

Baboo *Bungshi Dhur Sen* and Baboo *Gopal Chunder Sircar*, for Respondents.

The facts are sufficiently set forth in the judgment of the Court (1), which is as follows:—

The plaintiffs sued to recover possession and damages, in respect of certain jungle lands from which the defendants dispossessed them by misappropriating certain trees. The plaintiffs alleged themselves to hold the land in question under certain persons called the Moonshees, who again were themselves lessees under persons called the Mohunts. The defendants put in written statements, from which I gather that they claimed to hold under leases granted by the Mohunts. At all events, they averred that the Mohunts had not made any grants of the jungle to the plaintiffs, and they prayed that this might be made clear by adding the Mohunts as parties to the suit. This was done; and the Mohunts, being made defendants, put in a written statement in which they declared that

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the grant to the Moonshees was only of the right to reclaim and cultivate the lands in the mouzah, with a liability to pay rent in respect of every beegha of land so cultivated; and that the Moonshees or their lessees had no right in respect of the jungles or uncleared lands.

The plaintiffs, it seems, did not produce, in the original, either the pottah under which they held or the grant to their lessors. The absence of these documents was commented on by the Moonsiff, but that did not form the only ground of his judgment. He went into the merits of the case; and, finding that the plaintiffs' case was not made out, he dismissed the suit with costs. The plaintiffs appealed to the District Court, and the Judge observed that the plaintiff had to prove three issues: first, possession and ouster; secondly, their title to recover possession; and, thirdly, the damages, if any, sustained by them. As to possession, he appears to have been of opinion that the plaintiffs did not prove that they had distinct occupation of the wood-land plots which remain unreclaimed. He seems to agree with the Moonsiff, and apparently he would make that the ground for dismissing the suit; but he goes further into the question of title, and considers that the plaintiffs have failed to give the necessary proofs. He points out that they did not produce the original grants nor account for their absence, and considers that the plaintiffs must fail for want of legal proof of their title. He accordingly dismissed the appeal.

In special appeal it is contended that the kabuliat which the plaintiffs produced was sufficient evidence of their title; and that it came from the custody of the Mohunts themselves, the original owners. It seems to us, however, that the precise place assigned to counterparts in the 63rd section of the Evidence Act is that which the Judge states. The plaintiffs failed to produce either their own grant or the grant of their lessors; and entirely failed to account for their failure to produce them. They had ample notice that they were required to produce these documents; and, considering that this was not the only ground on which the dismissal of the suit was based, we do not feel bound upon to disturb the decision of the lower Appellate Court. The appeal is, therefore, dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

OBHOY CHUNDER SIRDAR AND OTHERS'. DEFENDANTS;

1878

AND

January 18.

RADHA BULLUBH SEN AND OTHERS . . PLAINTIFFS.

Enhancement—Fruit Trees—Act VIII (B.C.) of 1869, section 18.

In a suit for enhancement of rent, defendant pleaded that the land was used solely for fruit trees, and that those trees were originally planted by the defendant; that, consequently, any increase in the value and productiveness of the land in consequence of the growth of the trees must be attributable to the agency of the defendant, and therefore, by section 18 of Act VIII (B.C.) of 1869, such increase would be no ground for enhancement: *Held*, a bad defence.

SPECIAL APPEAL from a decree passed by the First Subordinate Judge of Tipperah, affirming that of the Moonsiff of Toobkee Bagrah.

This was a suit to recover arrears of rent at enhanced rates. The plaintiffs took an ijara of a certain mehal from the Government for fifty years, from the year 1265 B. The defendants had obtained a settlement of land containing a dwelling-house and a betel-nut garden, situate within the mehal, for a period of twenty years from 1258 B. On the expiration of this term plaintiffs demanded an increased rent, on the ground that the productiveness of the land had increased. The Court of First Instance dismissed the suit on a preliminary point, and this decree was affirmed on appeal. The plaintiffs specially appealed to the High Court, who remanded the case to be tried on its merits. On remand, both the lower Courts gave plaintiffs a decree. Defendants then brought this special appeal on the ground that their holding was not liable to enhancement under Act VIII (B. C.) of 1869, section 18.

Baboo Hurry Mohun Chuckerbutty, for Appellants.

Baboo Baikanto Nath Sen, for Respondents.

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Judgment.

The judgment of the Court (1) was as follows:—

We think that this appeal should be dismissed. When the language of the Subordinate Judge is fairly understood, we do not find that he has made any mistake in law, or that he has omitted to give such weight as they deserve to any of the points which have been urged by the defendants.

It has been contended before us that the Subordinate Judge misunderstood the High Court's judgment in supposing that they had decided that the defendant's rent was necessarily liable to enhancement; but when we look at the first decisions of the lower Courts, which the High Court's judgment corrected, it is plain what the High Court meant, and what the Subordinate Judge intends, in the judgment which is now under consideration.

The defendants' first contention was that, by the terms of the kabuliat which the plaintiffs (the ijardars) gave to the Government, they were not entitled to enhance. Upon remand, both the lower Courts have held that the tenure is liable to enhancement, and a decree has been passed for rent at an enhanced rate.

The point which has been mainly relied upon before us is, in our opinion, quite untenable. It is contended that because the land is used solely for growing fruit trees, and those trees were originally planted by the tenant, any increase in the value and productiveness of the land in consequence of the growth of the trees must be attributable to the agency of the ryot, and the expense which he has incurred; and consequently that, by the terms of section 18 of the Rent Law, such increase in productiveness would be no good ground for enhancement. But if this were so, the rent of no land, which has been originally let to tenants for the purpose of being brought into cultivation and planted with fruit trees, would ever be liable to enhancement. It is, in point of fact, untrue that the increased productiveness of an orchard, by reason of the growth of the fruit trees, is due to the agency of the person who first planted them. After the first expense of preparing the land, and planting and nurturing the young trees has been incurred, the increase in the productiveness of an orchard depends probably far less upon the labour and outlay of the tenant than land used for the ordinary purposes of

(1) GARTH, C.J., and BIRCH, J.

agriculture. The trees may require a certain amount of care and attention from time to time, but their growth and productiveness depend far more upon the quality of the soil, and the fertilizing influence of the seasons, than upon the labour of man.

It is quite right of course that, in settling the rent of land which is let for the purposes of an orchard, a due allowance should be made to the tenant to cover the cost of his original outlay in the way both of labour and capital; but, after such allowance has been made, there is no reason why the rent of lands used for orchards should not be liable to enhancement or abatement from time to time, in the same way as lands used for other kinds of culture.

Now, in this instance, it appears from the judgments of the lower Courts that a due allowance in this respect has in fact been made to these defendants. They have had a twenty-years lease of the land at a very moderate rent in order to cover the expense of planting, &c., which is said to be ordinarily recouped in the course of seven or eight years; and all that the plaintiffs claim in this suit is, that the rents should be enhanced according to the prevailing rates paid by other tenants occupying similar lands for a similar purpose, in the pergunnah. The lower Courts have both found that the plaintiff is entitled to such an enhancement. They consider that the defendants have had ample allowance made them for their original outlay and labour: and they have fixed the rent of the trees at the rate which is paid by other tenants for similar lands in the neighbourhood. We think, therefore, that the appeal should be dismissed with costs.

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[CIVIL APPELLATE JURISDICTION.]

1878
February

11. WOOD PETITIONER ;

AND

WOOD OPPOSITE PARTY.

Dissolution of Marriage—Separation—Desertion.

Where the separation between husband and wife is the act of the wife, or where the wife of her own free will assents to a complete separation, there can be no desertion of the wife by the husband ; nor, until husband and wife have again cohabited, can the subsequent conduct of the husband transform what was a voluntary separation into desertion by the husband.

The fact that a wife has, for two years before separation, withdrawn from conjugal intercourse with her husband, while continuing to live under the same roof with him, does not disentitle the wife to charge her husband with desertion ; provided such withdrawal was brought about by his misconduct, and was a matter to which he was wholly indifferent.

Fitzgerald vs. Fitzgerald, L. R., 1 P. and D., 694, discussed and distinguished.

APPEAL from a decree passed by Mr. Justice KENNEDY in the Original Civil Jurisdiction of the High Court.

This was a petition by the wife for dissolution of marriage on the grounds of adultery and desertion. The petitioner stated that she was married to the respondent, in Calcutta, in the year 1856, she being then over fifteen years of age ; that in the year 1862 she was induced by her husband to employ an ayah named Lado, and from that time he commenced to neglect his wife and treat her harshly ; that on and before the 31st of October 1864, the respondent committed adultery with the ayah, Lado, but nevertheless the petitioner continued to cohabit with him up to the year 1869. That from 1869 to 1871 the petitioner and her husband continued to live together, first in Dhurumtollah and afterwards in Circular Road, but during that time the petitioner withdrew from conjugal intercourse in consequence of his

misconduct. That from 1866 to 1871 the petitioner supported both the respondent and herself by her own exertions as a school teacher; that in February 1871 they separated by mutual consent, the petitioner no longer continuing able to support both; that thereupon she went to live with her friends, and he with his. That in 1871, while the husband was living with his friends, the petitioner visited him twice, but he treated her very coolly; that in March 1872, he left Calcutta for Madras, where he resided ever since, occasionally visiting Calcutta, but never coming to see or speak to her. That since the separation in 1871 the respondent had never contributed to the support of the petitioner; and that in 1874 and 1875 he, whilst residing at Madras, had been guilty of adultery on several occasions.

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—
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—

It appeared from the evidence in support of the petition that conjugal intercourse between the parties had not taken place since 1869; that after the separation by consent in 1871, the wife never attempted to induce her husband to return to co-habitation; and that during one of the visits of the respondent to Calcutta, in the year 1873, the petitioner saw him at the King of Oudh's Menagerie, but did not offer to speak to him. It also appeared that at the time the parties separated in 1871 they had not given up all idea of living together again.

Branson, Jackson and Trevelyan, for the Petitioner.

The Respondent did not appear.

KENNEDY, J. :—

I am very much afraid I cannot give the lady the relief she seeks. On her own showing there never was a time at which desertion could be said to have commenced. It is not necessary for me to express my opinion of the respondent's conduct,—the unfortunate lady seems to have had much to complain of,—but differences arose and conjugal intercourse, we are told, ceased two years before that which amounted to a separation. No doubt, they seem to have lived very unhappily together. Evidently, circumstances occurred which compelled the husband to live apart with her consent. In fact, unless on an undertaking of better behaviour, or the husband seeking to induce her to return to co-habitation,

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KENNEDY, J.

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KENNEDY, J.

she did not seem anxious to return to co-habitation. She did not write, she says, because it was his part to have first written, and she did not seek to return. The cases cited were very strong, but of very great peculiarity. I think we have got the true principle laid down in *Fitzgerald vs. Fitzgerald*, L. R., 1 P. and D., 694, and *Ward vs. Ward*, 1 Sw. and Tr., 500. In *Fitzgerald vs. Fitzgerald*, in which the conduct of the husband seems to have been as bad as bad could be, the principle is laid down in the plainest manner that :—"No one can desert who does not actively and wilfully bring to an end an existing state of co-habitation. If the state of co-habitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, desertion becomes impossible to either, at least until their common life and home has been resumed. The refusal by either at the request of the other to assume conjugal relations does not constitute the offence of desertion." Therefore, the suggestion I threw out in the argument, of converting the original separation into desertion by a requisition to resume conjugal relations, would seem not to be well founded law. In that case of *Fitzgerald vs. Fitzgerald*, the facts were as bad as anything could be. That placitum seems fully borne out by the judgment of the Court. The Judge Ordinary says : " Putting the facts in the most favourable light for Mrs. Fitzgerald, it would, I presume, be argued thus : After the first suit was at an end, Major Fitzgerald might, at any time, have demanded co-habitation of his wife ; she was not unwilling to return to him ; and if she had been, the law would have compelled her ; but he made no such demand ; therefore, he wilfully kept apart from her ; therefore, he deserted her. If, indeed, keeping apart from a wife who has voluntarily quitted her husband against his will and withdrawn from co-habitation, is the same thing as 'deserting' her, the argument must prevail. But I cannot think that it is. It is one thing to make a breach, it is another to refrain from attempts to heal it. Desertion means abandonment, and implies an active withdrawal from a co-habitation that exists ; the word carries with it an idea of forsaking or leaving, and is hardly satisfied by the negative position of standing apart." There was a re-hearing applied for, but the Court ~~affirmed~~ the same opinion as before.

We thus know it established that "no one can desert who does not actively and wilfully bring to an end an existing state of co-habitation," which certainly does not seem to have occurred in this case. Possibly it might be noted under the circumstances of this case, that a call to renew co-habitation might convert the separation into desertion, but I think it would be dangerous for the petitioner to try it, as, if acceded to, it would certainly condone the prior offences, and disentitle this unfortunate lady even to judicial separation. In *Ward vs. Ward*, COCKBURN, C.J., and the Judge Ordinary were sitting together. COCKBURN, C.J., says: "The evidence raises a doubt as to the desertion. If disagreements and quarrels took place, and both parties were bound over to keep the peace, can you treat a subsequent separation as desertion? Suppose, an arrangement had been made by the advice of the Police Magistrate to separate by mutual consent; though the husband may have left her, yet, if there were a corresponding animus on the part of the wife, if she were a party to his leaving and consented to it, that would not constitute desertion. The act of desertion must be done against the will of the wife."

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Again, there is the case of *Townsend vs. Townsend*, L. R., 3 P. and D., 129, where the original separation being involuntary in consequence of fear of arrest, it was held not to be a desertion. Here, it was involuntary from want of means, and, in consequence of that pressure, assented to by the petitioner. I think, therefore, that, having regard to the foregoing decisions, I should not be justified in pronouncing for a dissolution, but the petitioner is duly entitled to a judicial separation. I shall not, however, give a final decision—that the petitioner may determine whether she will take the opinion of another Court, or whether she will try the effect of such a notice as I suggested.

[The petitioner declined to accept a decree for judicial separation, and applied for leave to put further evidence on the record, and for a further hearing. The hearing having been granted, the following judgment was delivered by the same learned Judge:]

Possibly, if Mr. Jackson's very able argument had been addressed to me before I had occasion to consider the case, and had formed a deliberate opinion, I might have given judgment in

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 August 13.
 KENNEDY, J.

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KENNEDY, J.

favour of his client; but, when I gave my former judgment, I had thoroughly convinced myself by examination of all the decisions bearing on the subject, that there was not in this case what amounted to desertion, and I still retain this opinion. I had not intended to permit further argument, but the petitioner having applied for leave to put further evidence on the record, I postponed the case for that purpose; and I then did not wish to prevent Mr. Jackson calling my attention to his view of the authorities. Naturally the Courts before whom this question has come, were anxious to avoid laying down a general principle rashly, and, as much as possible, relied on the special circumstances in each case as constituting desertion, or preventing the separation from taking that character; but in *Fitzgerald vs. Fitzgerald*, L. R., 1 P. and D., 694, the Judge Ordinary does lay down in unmistakable terms a principle, which, I think, I am bound to accept, even if it did not commend itself to my mind as correct. He says: "No one can desert who does not actively and wilfully bring to an end an existing state of co-habitation." He explains, as I understand him, that mere absence does not necessarily cause a breach of co-habitation; that there may be cases in which, as in *Williams vs. Williams*, 3. Sw. and Tr., 547, there was personal severance with what may be called constructive co-habitation; but I do not see that the present case is brought within them. *Townsend vs. Townsend*, L. R. 3 P. and D., 129, shows that withdrawal from the wife's society under pressure of circumstances is not abandonment against her will; and even if (in spite of the language in *Fitzgerald vs. Fitzgerald*) any subsequent events may change the original separation into desertion, I do not find any thing to bring this case within them as they are explained in *Fitzgerald vs. Fitzgerald*, and to make me believe that the co-habitation was merely suspended.

On the contrary, in this case this unfortunate lady had suffered long and much from her husband's misconduct; conjugal co-habitation in its full sense had ceased for two years before there had been a severance of residence by mutual consent, caused by the pressure of circumstances; and I cannot help believing that she must unconsciously overrate her wish to return to co-habitation, when one sees the earlier statements in her case.

examination and her description of her attempts to re-claim him, which forcibly brought to my mind the case of Adriana in the Comedy of Errors. I cannot get over the express language of Lord PENZANCE in *Fitzgerald vs. Fitzgerald*. If the state of co-habitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, desertion, in my judgment, becomes impossible to either, at least until their common life and home has been resumed. If, however, this opinion of mine be erroneous, my error may be corrected by the Court of Appeal; and I have, therefore, afforded this lady the fullest opportunity of bringing upon the record every fact deemed material by her advisers.

The petitioner appealed. ●

Jackson (Trevelyan, with him), for Appellant, contended that the judgment of the lower Court was wrong, on the ground that the separation was not voluntary, and that the respondent had showed by his subsequent conduct that he deserted his wife when he went to Madras in 1872.

[GARTH, C.J.—It is not a question of what the respondent has done. His conduct may seem to have amounted to desertion over and over again. You have to satisfy us that the separation was against the will of the wife; if it was not, the separation was voluntary and does not amount to desertion.]

Counsel cited *Haviland vs. Haviland*, 32 Law Jour. Pr., 66; *Gatehouse vs. Gatehouse*, L. R., 1 P. and D., 331; *Meara vs. Meara*, 35 Law Jour. Pr. 33; *Cunlip vs. Cunlip*, 27 Law Jour. Pr., 64; *Graves vs. Graves*, 33 Law Jour. Pr., 66; *Williams vs. Williams*, 3 Sw. and Tr., 547; *Gibson vs. Gibson*, 29 Law Jour. Pr., 25.

The judgment of the Court (1) was delivered by

GARTH, C.J. :—

In this case, the parties were married in September 1856; the petitioner being then about fifteen years of age. They lived together in Calcutta for some years after the marriage, but they had no children. In October 1864, the petitioner discovered that the respondent had committed adultery with her

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Ayah. She did not, on this account, withdraw from co-habitation with the respondent; but from that time the respondent treated her with neglect. About this time she began to support herself by teaching in a school; and in 1869, in consequence of his constant absence until a late hour at night, she ceased to have sexual intercourse with him. They continued, however, to live together; and there is no reason to suppose that the husband was desirous of renewing the intercourse. On the contrary she states, and this is not denied, that at this time her husband wholly neglected her. During this time also the respondent contributed nothing to the support of the petitioner, and frequently made demands upon her for money for his own purposes. They became involved in debt, and in 1871 were obliged to give up the house in Circular Road in which they then resided. The petitioner then proposed that they should take a smaller house, which they could have done, but the respondent refused to sign any lease; and it was then, under the pressure of pecuniary difficulties, that they arranged that he should go to his mother's house until they could find means to provide a home. Whilst he was at his mother's house, she visited him twice, but he treated her with the greatest indifference. When the house in Circular Road was given up, the wife had retained sundry articles of furniture with a view to the possibility of their living together again; but the husband had them sold, and the proceeds were spent by him. He afterwards left his mother's house, and refused to tell his wife where he was going. In 1872, without any communication with his wife, he left Calcutta for Madras, where he has since resided, and has been guilty of frequent acts of adultery. He has occasionally visited Calcutta, and she once saw him, but only in public. On this occasion she did not speak to him, nor he to her. From 1869, down to the present time, the petitioner has resided in Calcutta, and the respondent has contributed nothing to her support.

There being no doubt as to the adultery, the only question is as to the desertion. The learned Judge of the Court below thought that he was compelled, upon the authority of the case of *Fitzgerald vs. Fitzgerald*, L. R., 1 P. and D., 694, to hold that in this case there had been no desertion, because the separation in 1871

was assented to by the wife. Now we do not for a moment dispute the proposition that, either where the separation is the act of the wife, or where the wife of her own free will assents to a complete separation, there can be no desertion; nor, until husband and wife have again co-habited, can subsequent conduct transform what was a voluntary separation into desertion by the husband. But we think this is not a case of that kind. In the case of *Fitzgerald vs. Fitzgerald*, upon which the learned Judge relied, the separation took place by the act of the wife alone; not in obedience to any external necessity, but for the express purpose of avoiding continued intercourse; and intercourse was not merely suspended by her, but put an end to. It is upon these grounds that Lord PENZANCE considered the desertion in that case to be the act of the wife. But here the case is wholly different. The wife, notwithstanding the gross misconduct of her husband, continued to live with him for seven years; during the latter years, struggling by her own earnings to keep up a home for herself and him, whilst he did nothing. Even when at last she was compelled by their debts, and his refusal to enable her to take a smaller house, to separate from him, she did all she could to prevent an entire separation, and to make it practicable for them to live together again. But she was thwarted in these attempts by her husband; he sold the little furniture she had saved; he repelled her visits; and at last he refused to let her know where he was to be found. No doubt, after he left Calcutta for Madras, she made no further attempt to go to him, or to induce him to return. But we think she had done, not only all that any woman could be reasonably expected to do, but, from a legal point of view, enough to show that the separation was neither brought about by her, nor in accordance with her wishes. It may, indeed, be true, that the respondent would have been perfectly willing to go on living with the petitioner, if she could have earned enough money for them both, whilst he remained in idleness; and as long as she could do this, she was also willing, in spite of his misconduct, to live with him even upon these terms. But we think it is clear from his conduct immediately after they gave up home in 1871, and subsequently, that, when he found his wife could not support him, he was desirous to be rid of her altogether. After they

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had been compelled to live apart, by difficulties of his own creating, he was bound to keep up with her such intercourse as the nature of the case admitted; but this, in our opinion, he distinctly refused to do.

When the case was being argued, we were disposed to think that the petitioner having for two years withdrawn from conjugal intercourse with the respondent, she could not afterwards complain that her husband had deserted her; but it is clear that this withdrawal was brought about entirely by the husband's misconduct, and that it was a matter to which he on his part was wholly indifferent.

We cannot find any authority that a withdrawal under such circumstances disentitles a wife to charge her husband with desertion. We think, therefore, that we ought to grant a decree *nisi* for a dissolution of the marriage, instead of a judicial separation; and that the petitioner should have her costs in both Courts.

[CIVIL APPELLATE JURISDICTION.]

IN THE MATTER OF

UMBICA NUNDUN BISWAS,

INSOLVENT ;

Surno Bhye APPELLANT ;

Handford and Crew RESPONDENTS.

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February 11.11 and 12 *Victoria*, Chap. 21, section 26—*Insolvent Act—Summary Procedure.*

The procedure under section 26 of the Insolvent Act is not calculated to effect satisfactorily the trial of difficult questions of title, and the Court will, in accordance with its usual practice, abstain from deciding such questions in proceedings under that section, and refer the parties to a regular suit.

In re Dwarkanath Mitter, 4 B. L. R., 63, approved.

APPEAL from a decree passed by KENNEDY, J., sitting as Commissioner in Insolvency.

The petitioner in this case was adjudged an insolvent on a creditor's petition in March 1876. He filed his schedule in February 1877, when it appeared that he was hopelessly insolvent; that he had transferred the sum of Rs. 41,000 to one Surno Bhye, a prostitute, on the 3rd of June 1875, for certain purposes; and that he had executed a deed in January 1876, in which he declared that she had accounted satisfactorily for the Rs. 41,000, and that he absolved her from all future liability to him, his heirs, executors, administrators or assigns in respect of that sum. The petitioner swore that he merely deposited the money with Surno Bhye, but she contradicted this, swearing that the money was given to her partly as a gift, and partly in payment of moneys which he owed her at the time. She also relied on the release and on the account therein mentioned. It appeared that the insolvent had made Surno Bhye large presents of jewellery.

On the 3rd of May 1877, the Court, under 11 and 12 Vict., c. 21, section 26, ordered that Surno Bhye do hold and retain, subject to the further order of the Court, the sum of Rs. 22,033, being a portion of the sum received by her from the insolvent, and the jewellery received by her from the insolvent; and it was

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further ordered that the said Surno Bhye do attend and show cause why she should not make over to the Official Assignee the said sum of Rs. 22,033 and the said jewellery, as being assets belonging to the estate of the said insolvent. The case having come on for hearing, the whole of the questions between the parties, both of law and fact, were gone into at great length in the Court below, and in the result it was ordered by Mr. Justice KENNEDY :—

“That Surno Bhye do pay Rs. 11,033 (being the balance of the 22,033 before mentioned, deducting the Rs. 11,000 for repairs and re-building of the house of Surno Bhye) and make over the said jewellery to the Official Assignee, and that the said Assignee be at liberty to take such proceedings with regard to the residue of the money received by Surno Bhye as he might be advised.”

Against this order Surno Bhye appealed on the following grounds : (1) that the learned Commissioner should have refused to make any order under the provisions of section 26 of the Insolvent Act, as not applicable to a case of this kind, the word ‘property’ in that section not including money ; (2) that even if section 26 of the Insolvent Act applied to the case, the learned Commissioner, on the evidence before him and on the finding in which his judgment is based, namely, that it was a gift to Surno Bhye, should have discharged the rule ; (3) that instead of making the rule absolute in respect of any of the sums as to which the rule issued, he should have discharged the same with costs.

Jackson, (*Evans* and *Phillips* with him,) for the Appellant.

Counsel cited *Foley vs. Hill*, 1 Phillips, 399 ; *Devaynes vs. Noble*, 1 Mer., 529 ; on following trust money, *Pennell vs. Deffell*, 4 De G. M. and G., 372 ; *Great Eastern Railway vs. Turner*, L. R., 8 Ch. App., 149 ; scope of 26th section of Insolvent Act, *Dwarkanath Mitter's case*, 4 B. L. R., 63. Also Bankruptcy Act, 12 and 13 Vict., c. 106.

Bonnerjee, for the opposing creditors of the Insolvent, Messrs. Handford and Crew.

[The case having been argued at considerable length, and Mr. Evans having commenced his reply, the Court intimated that they would consider their judgment ; that they did not think the

judgment of the Court below could stand, but that they would give no costs on either side.]

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Insolvent.

The judgment of the Court (1) was delivered by

GARTH, C.J. :—

We allowed the case to proceed in the hope that, as the parties have already incurred so much expense and trouble, we might have arrived at some satisfactory solution of it, which might obviate the probability of any further litigation. But the farther we proceeded, the more difficult and complicated the matter in dispute became ; and we could no longer doubt that both as regards the facts and the law, some very serious questions of title and otherwise are at issue between the parties. Under these circumstances we felt that, in the exercise of our discretion, we should be wrong in attempting to settle so serious a dispute in a summary proceeding under section 26 of the Insolvent Act.

February 11.

GARTH, C.J.

We believe that it has always been the practice of this Court to abstain from deciding difficult questions of title under that section, and to leave the parties to settle such questions by a regular suit, and we entirely approve of that practice. (See the case of *In re Dwarkanath Mitter*, 4 B. L. R., 63.)

The procedure under section 26 is not calculated to effect satisfactorily the trial of difficult questions of title ; and our judgment, even if we thought it right to decide the matter, would not be conclusive. Either party might, if they chose, raise the same question again, in a regular suit.

We think, therefore, that this appeal should be allowed ; but we think that, under the circumstances, the rule (obtained, as we consider it was, at the instance of Mr. Bonnerjee's client) should be discharged, without costs on either side ; it being quite understood that we give no opinion as to the merits of the dispute.

(1) GARTH, C.J. and MARKBY, J. .

[CIVIL APPELLATE JURISDICTION.]

1878
March 13.

SHAIKH KAMALOODDEEN PLAINTIFF;

AND

ANOO MUNDUL DEFENDANT.

Rent Suit—Non-joinder of co-sharers—Evidence.

It has often been decided that, from the fact of rent having been collected for some time by one of several co-sharers separately, an agreement for payment of the separate rent of a share could be presumed: *Held*, (on appeal from AINSLIE, J.,) that the facts of the case were not sufficient to warrant the making of such a presumption.

APPEAL under section 15 of the Letters Patent from a decree passed by Mr. Justice AINSLIE. The judgment of the learned Judge and the facts of the case will be found reported at page 248, *ante*.

Mr. H. E. Mendies, for Appellant.

Baboo Jogesh Chunder Roy, for Respondent.

The judgment of the High Court (1) was delivered by

GARTH, C.J. GARTH, C.J. :—

We have had some doubt about this case during the argument, because we thought at first that there was sufficient evidence to justify the Courts below in finding what they appeared to have found, that there was, by arrangement, a separate collection by the plaintiff of his share of the rent: but on looking more carefully into the grounds of the judgment of the learned Judge of this Court, we think that he was right; and that there was no evidence to warrant the Courts below in finding the existence of such an arrangement. In point of fact, the plaintiff in his plaint does not say that any such arrangement was made. On the contrary, he asks in his plaint for a proportionate part of the entire rent.

(1) GARTH, C.J., and McDONELL, J.

The plaintiff only purchased his share in 1874; and he himself has only received a small sum by way of rent; but his predecessor was called for the purpose of proving that the rent of the share, which he sold to the plaintiff, had been collected separately. Now the sum which the plaintiff claims as his share of the rent, viz., Rs. 10-2, turns out not to be the sum to which he is entitled; whereas, if there had been any arrangement with the tenant to pay separately, and any payments made under that arrangement, it is clear that the sum agreed upon would have been properly ascertained. But the evidence in the case negatives this; and the plaintiff does not say in his plaint that there is any particular ascertained sum due to him from the defendant. Again, looking into the evidence of the plaintiff's predecessor, it is clear, that though occasionally he might have received his share separately, he also collected the rent for the other co-sharers.

No doubt it has often been held in this Court that, from the fact of the rent having been collected for some time by one of several co-sharers separately, an agreement for payment of the separate rent of a share could be inferred. But there is no sufficient evidence in this case to warrant such a finding. We are therefore of opinion that the learned Judge was right; and that the appeal should be dismissed with costs.

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GARTH, C.J.

[CIVIL APPELLATE JURISDICTION.]

1878
January 16.
April 1.

DWARKA NATH BYSACK AND OTHERS . . . PLAINTIFFS;
AND
BURRODA PERSAUD BYSACK DEFENDANT.

Will—Construction—Gift of Surplus—Void Gifts—Residue.

Where, in a will, certain bequests were made, and, “should there be any surplus after the above expenditure,” that surplus was to go in a certain and legitimate way: *Held*, that the gift of the “surplus” was equivalent to a gift of the residue; and that the preceding gifts would, in the event of their proving invalid, fall into the residue and pass with it under the will.

Chapman vs. Brown, 6 Vesey, 404; *Mitford vs. Reynolds*, 1 Ph., 185; *Fisk vs. The Attorney-General*, Law Rep., 4 Eq., 521; discussed.

APPEAL from a decree passed by Mr. Justice PONTIFEX in the Original Civil Jurisdiction of the High Court.

This was a suit for a declaration of plaintiffs’ rights to undivided shares in ancestral joint estate, for construction of the will of Kristo Mohun Bysack, for a declaration of plaintiffs’ rights in his estate, for administration, for an injunction and an account, and for the appointment of a trustee in place of the defendant.

Kristo Mohun Bysack died on the 19th of April 1870. By his will he bequeathed nearly all his property to the defendant in trust for certain charitable purposes, and appointed the defendant his executor, who proved the will in solemn form and got probate on the 9th of March 1871. The plaintiffs who were not parties to the administration suit, claimed that eight annas of the property in the defendant’s possession as executor, belonged to them in their own right; they also claimed that the disposition of the property made by the will was void, and alleged that the defendant had wasted the estate. In this will the testator, after giving directions regarding payment of certain legacies, empowered the defendant, his executor, to collect the rents and profits of his property and hold them in trust for the following purposes, amongst others:

"I do hereby direct my trustee to feed the really poor and needy at Gopeenathjee, out of a separate expense out of my estate to be contributed to the worship of Luckheejunardinjee, my ancestral goddess.

"I do hereby direct my trustee to spend suitable sums, at the annual *shradh* or anniversaries of my father, mother, and grandfather, as well as of myself after my demise for the performance of the ceremonies and the feeding of the Brahmins and the poor. To spend suitable sums for the annual contribution and gifts to the Brahmin Pundits holding tolls or native schools for the diffusion of Sanscrit learning in the country at the time of the Doorga Poojah. To spend suitable sums for the perusal of Mahabharat and Puran, and for the prayer to God during the month of Kartick. Should there be any surplus after the above expenditure, then I do hereby direct my trustee to spend the said surplus in the contribution towards the marriage of the daughters of the poor in my class and of the poor Brahmins, and towards the education of the sons of the poor amongst my class and of the poor Brahmins and other respectable castes as my trustee will think fit to comply."

It was upon the construction of this last clause that the case mainly turned. The plaintiffs applied for an interlocutory injunction for the purpose of restraining the defendant from dealing with the testator's estate. The application was refused, and the case came on for hearing.

Evans, Bonnerjee and Stokoe for the Plaintiffs.

Stokoe.—The plaintiffs contend that the property of which Kristo Mohun died possessed was not his separate property, but was joint property, of which they are entitled to a share; so far they claim against the will. They also contend that all the provisions of the will are void for uncertainty; that, therefore, Kristo Mohun died intestate as to this property, and plaintiffs are his nearest heirs.

[PONTIFEX, J.—The gift of the surplus for education is not uncertain.]

But it was only a surplus that was to go in that way. The testator never intended that the whole of his property should be spent in education. He never contemplated that the gift preceding the gift of the surplus would be void, and has made no

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1878 provision therefor. The surplus is, therefore, incapable of being ascertained.

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Phillips, for the Defendant, supported the will.

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PONTIFEX, J. :—

[The claim against the will was tried separately and dismissed ;
January 16. costs reserved.]

Judgment.

PONTIFEX, J.

Plaintiffs claim to be entitled in their own right to a moiety of the properties of which the defendant has possessed himself as executor of his testator, alleging that such properties are joint family properties in which they have an eight annas share. I have already disposed of that part of the case by deciding, on the evidence, that the properties in question were not joint properties, but, on the contrary, were the separate properties of the testator.

The plaintiffs, however, claim to be the heirs of the testator, and allege that, upon a proper construction of his will, part of his property is undisposed of, and that they, as his heirs, are entitled thereto as upon an intestacy. This part of the case has been argued merely on the construction of the testator's will ; and the defendant has had no opportunity of contesting by evidence the alleged heirship of the plaintiffs. Probably, he would not be able to disprove the plaintiffs' evidence of such heirship ; and, for the purposes of this decision, I will assume that the plaintiffs are the heirs of the testator. The argument has been confined to the last clause of the will which is written in very imperfect English.

In the administration suit, to which this suit is prayed to be supplemental, the prior bequest for feeding the poor at Gopeenathjee, and for the worship of Luckyjunardingee has been recognized as valid ; and an enquiry has been directed with respect thereto.

But the decree in the administration suit does not deal with the last clause in the will, possibly, for the reason that induced Lord COTTENHAM to postpone the decision of a similar question in *Miford vs. Reynolds* (16 Sim., 108), viz., the uncertainty whether any residue would exist until shewn by the taking of the accounts. But as one of the main objects of the present suit is to

obtain a decision upon the validity of the residuary gifts in the will, and as the plaintiffs' title to sue depends upon the alleged invalidity of such gifts, I think it would serve no useful purpose if I further postponed the decision of this question of construction.

As I understand the plaintiffs' arguments, they assert that the directions in the last clause of the will, that the trustee should spend suitable sums upon the annual *shradhs* of the testator and his ancestors, and for the feeding of the Brahmins and the poor at such ceremonies, as also the direction that the trustee should spend suitable sums for the annual contribution and gifts to the Brahmin Pundits holding tolls for learning at the time of Door-gah Poojah, and also the direction to spend suitable sums for the perusal of Mahabharat and Puran and for the prayer of God during the month of Kartick, are so vague—the exact amount of the sums to be laid out not being specified—that the amounts are, in fact, unascertainable; and, consequently, that the subsequent directions to the trustee to spend the “surplus” in what is admitted on behalf of the plaintiffs to be otherwise a good and valid bequest, must also fail as being void for uncertainty, since the amount of such surplus cannot be ascertained. No authorities were cited in support of this argument, which, however, raises a question of considerable difficulty, and is, in fact, the subject of conflicting authorities.

In the case of *Chapman vs. Brown* (6 Vesey, 404,) a testatrix gave the residue of her estate to executors to be applied for the purpose of building or purchasing a chapel, and if any “over-plus” should remain, she directed it should be applied for certain charitable purposes, which direction would of itself have been a valid disposition of the “surplus.” In that case the bequest for the chapel was held to be illegal as infringing the Statute of Mortmain; but Sir William GRANT was of opinion that if there had been any possible way of ascertaining the proper amount which, if the gift for the chapel had been valid, the executors ought to have expended on the chapel, then the amount of the surplus might have been ascertained, and the gift of the surplus would have been good. But he held that, inasmuch as there were no means of ascertaining the amount which ought to have been

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expended on the chapel, the amount of the surplus was also unascertainable, and the gift of the "surplus," was, therefore, void for uncertainty.

In the later case of *Mitford vs. Reynolds*, (1 Phillips, 185) a testator directed the purchase of a particular piece of land on which were to be constructed a vault and a monument; and he bequeathed the residue of his estate to the Government of Bengal for valid charitable purposes. Lord LYNTHURST decided that even if the first bequest was illegal or incapable of being carried into effect by reason (as afterwards happened) of the owner of the particular piece of land refusing to sell it, still the amount which it would otherwise be proper to expend was ascertainable, and, therefore, the gift of the residue was not void for uncertainty.

The ultimate decision of this last case (in 16 Simon, 105), however, rested on a different ground, viz., that upon the construction of the will the residue bequeathed was a residue found after providing for the debts, legacies and monument; and, therefore, that the money which would have been devoted to the monument if the directions with respect thereto could have been carried out, fell into the residue as in the case of any other void bequest.

These conflicting cases have been commented on by Lord HATHERLEY, when Vice Chancellor, in *Fisk vs. Attorney General*, L. R. 4 Eq., 524.

Now, applying these authorities to the case before me, it seems to me that, with respect to each of the gifts which are objected to by the plaintiffs, even if it was illegal, still the amount which otherwise it would be proper to expend on it could be ascertainable, and consequently the amount of the surplus, if any, would also be ascertainable. An inquiry might be directed what sums the testator himself had during his life been accustomed to expend on these particular objects, or what sums are usually expended in similar circumstances by families with means corresponding with the position of the testator; and it appears to me that it would not be difficult to arrive at an ascertainable conclusion with respect thereto, and consequently that the gift of the surplus would be sufficiently definite and valid. If, however, the bequest immediately preceding the bequest of the surplus was void, any

other reason invalid, and if the gift of the surplus could not be treated (as in the ultimate decision of *Mitford vs. Reynolds*) as an ordinary residuary bequest, the plaintiffs, assuming them to be the heirs of the testator, would be entitled to the amounts of the invalid bequests as undisposed of by the will. But I am of opinion that their claims fail in both these particulars.

First, I think that all these gifts, if the amounts of them can be ascertained—and I have said it seems to me that such amounts are ascertainable—are valid testamentary bequests, and such as a Hindoo testator can lawfully make; and, secondly, I think the words “should there be any surplus after the above expenditure,” occurring in this informal will, must be construed as creating a general residuary bequest; and, consequently, that the preceding bequests, even if invalid, would fall into the residue as in the case of any other void bequest.

Some argument was addressed to the employment by the testator of the word “surplus” as meaning something different from “residue,” but it seems to me that the words have identical meanings; one meaning “that which is over,” and the other “that which is left;” and I may observe that they are treated as identical in meaning in section 2 of the Hindoo Wills Act (which however does not govern this will), and also by the plaintiffs themselves in paragraph 15 of the plaint.

The result, therefore, of the case is that I am of opinion that the plaintiffs fail on all points; and I must, therefore, dismiss the suit, and order them to pay the whole costs.

The plaintiffs appealed.

Evans and Bonnerjee, for the Appellants.

Evans.—Our first contention is, that the gifts in the last clause in the will are void, and that we are entitled as on an intestacy. Even if they are not void, if these vague intentions could be carried out, yet we allege that Burroda Persaud has mis-conducted himself, and claim that he should be removed from the management of the trust property. As regards this latter claim, it may be objected that we are uninterested parties, that we have no *locus standi*; but this is a mistake. We are the nearest heirs; it is we alone who can perform the *shradh*

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for which suitable sums are to be spent; and, finally, the estate is vested in us; for the executor of a Hindu will is a mere manager who takes no estate in the property unless it is expressly given to him, which is not the case here. The estate which must be vested somewhere is vested in us who are the nearest heirs, subject to the defendant's power of managing it for the purpose of carrying out the valid trusts (if any) contained in the will. There are no valid trusts contained in the last clause of this will. As regards the "suitable sums" for the performance of the *shradh*, no doubt that could be ascertained, and we, as the proper persons to perform it, should have a voice in the matter; but it is impossible to find out the proper sums to be expended on the Brahman Pundits and for the perusal of Mahabharat. As for the surplus, the trustee is empowered to spend as much of the surplus as he likes, and if he were a near relation of the testator's it might be fairly argued that he should take it beneficially, but this argument is destroyed by the next paragraph in the will which says that he is to be a trustee for the purpose of carrying out the foregoing directions. We do not admit that the gift of the surplus is good; if, as the learned Judge says, such an admission was made in the Court below, then it was an admission of law which the *Tagore case* shows is not binding.

[GARTH, C.J.—Do you contend that there is no mode of ascertaining what should be paid out to these Brahmins?]

Evans.—Yes, my Lord. Your Lordships will remember that there is a great distinction between public and private charities. The leaning of the Courts in favour of public charities is purely exceptional, and arose out of the construction which was put upon the Statute of Elizabeth in favour of charitable uses—43 Eliz., Ch. 4. Apart from that Statute, the ordinary rule is that the bequest will be void if the amount or the objects are uncertain. This ordinary rule will prevail where, as in this case, the equitable extension does not apply, and here both amount and objects are uncertain. The present case is that of a private charity which is merely benevolence; it is in its nature indefinite, and the Court will not, on that account, take it up. The tolls are certainly private. The alms at Doorga Pooja and the sums for the reading of the Puran are clearly not public. [During his argument on this point counsel cited

Srimati Joykali Debi vs. Shibnath Chatterjee, 2 B. L. R., O. C., 1 ; *Chapman vs. Brown*, 6 Vesey, 404 ; *Mitford vs. Reynolds*, 1 Phillips, 185 ; 16 Simon, 105 ; *Attorney-General vs. Hingsen*, 2 Jac. and W., 270 ; *Morice vs. Bishop of Durham*, 10 Vesey, 522 ; a case in Fulton's Reports, p. 275 ; *Fisk vs. Attorney-General*, L. R., 4 Eq., 521 ; *Hunter vs. Bullock*, L. R., 14 Eq., 45 ; *Dawson vs. Small*, L. R., 18 Eq. 114 ; *Fowler vs. Fowler*, 33 Beavan, 616 ; *Ommaney vs. Butcher*, 1 Turn. and Rus., 260.] Supposing your Lordships be adverse to us on the question as to the validity of these gifts, yet we say that there has been gross misconduct on the part of this trustee ; that we alone can perform the *shradh*, for which we are to get suitable sums ; and that the testator's estate is wasted. In the face of such circumstances we are surely entitled to an account as the estate is vested in us.

Jackson—This matter was never raised in the Court below.

Evans.—The facts supporting it are here on the face of the plaint. I certainly raised it when I opened the case ; and, as far as I know, it was not abandoned.

[After some further discussion, the Court ruled that this point could not be taken on appeal. It was not raised on the settlement of issues in the Court below ; nor was any objection made on that ground when the learned Judge of that Court delivered his judgment.]

Jackson, Phillips, and Pearson, for the Respondents.

Phillips.—There are two things to be considered in this case, in connection with the last clause of the will : The first is whether the prior bequests contained in that clause are void ; and as to this, it has been contended that they are void on the ground of vagueness. All the cases, however, which have been cited by Mr. Evans, go to show what is the well-settled rule, namely, that however vaguely or generally a charity may be directed to be carried out, the Court will uphold it on the ground of its being a general charity. The next matter to be considered is what becomes of the money supposing these gifts are void ; and as to this we contend that it falls into the residue where, as in this case, there is a valid residuary gift. It must be remembered that the residue of a residue stands in a different position from the residue

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v.
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PRESAUD
BYBACK.

Argument.

of an estate. If the void gift is a part of the residue it will not fall into the residue of the residue, but go as on an intestacy, and this is what was decided in *Chapman vs. Brown*. But where the void gift is not a part of the residue, it will fall into the residue, and this is what was decided in *Mitford vs. Reynolds*. The latter is precisely the case here. The testator clearly intended the gift of the surplus to be a residuary gift—a gift of the residue—and what would not be expended in any other way should go into it. The object of the residuary gift, at least, is a good public charity; and where there is expressed a public charitable intention as well as a private charitable intention, then if the private one be void the public one will be carried out. Even if it should be held that the object of this residuary gift is not a public but a private charity, still it is in no respect vague, and the cases cited on the other side do not apply.

Evans, in reply :—

The first point taken by Mr. Phillips is that, though these gifts and legacies may be void, yet if there is a general intention to give in charity, the King as *parens patriæ* will see it carried out. Now this principle depends on the Statute of Elizabeth which does not apply to such gifts as those in this case. Hindu charities are private charities, and it is as private charities that they are upheld. A *shradh* does not come under the Statute of Elizabeth. Money for Brahmins holding *tolls* is also private. It is not given to found schools for Sanscrit learning, but is given merely as a present at a particular time of the year—something in the nature of a Christmas box. The same observations apply to the reading of the Puran and Mahabharat. The second point made was as to the residue. Now the whole groundwork of the doctrine of throwing everything into the hands of the residuary legatees is explained in the case of *Sadler vs. Turner*, 8 Vesey, 617, which shows that there must be words used which show a clear intention to that effect on the part of the testator. It is very dangerous to apply the English doctrine of residue to a Hindu will, especially where the testator himself does not use the word. He says merely that the surplus, if there is any, is to go. The case of *the Attorney-General vs. Johnson*, 2 Ambl., 577, is exactly in point here, and shows that the gift of a surplus, “if there is any,”

not carry everything remaining to the residuary legatee. You are not to introduce here the technical terms of English Law, but to read the will in a plain way and ask what the testator meant to do. It is clear that he never meant the most of his property should go as "surplus." It is not enough in order to die testate, that a testator has an intention of disposing of his property; he must actually do it. (See Jarman on Wills, vol. 2, pp. 660, 734.) Here the testator says he is disposing of the surplus which may arise out of a fund certain. It is only a gift of a possible overplus, and there is nothing in the will that supports a gift of the residue.

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 DWARAKA
 NATH BYSACK
 AND OTHERS
 v.
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 PERBAUD
 BYSACK.
 Argument.

The judgment of the Court (1) was delivered by

GARTH, C.J.:—

Only two questions are raised in this appeal: first, whether certain bequests made by the testator are valid; and, secondly, whether if they are invalid, a residuary bequest which follows them is invalid also.

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 April 1.
 GARTH, C.J.

The clause of the will, upon which the question arises is as follows: "I do direct my trustee to spend suitable sums at the annual *shradhs* or anniversaries of my father, mother and grandfather, as well as of myself after my demise, for the performance of the ceremonies, and the feeding of the Brahmins, and the poor. To spend suitable sums for the annual contribution and gifts to the Brahmin Pundits, holding *tolls* or native schools for the diffusion of Sanscrit learning in the country at the time of the Doorga Poojah. To spend suitable sums for the perusal of Mahabharat and Puran, and for the prayer to God during the month of Kartick. Should there be any surplus after the above expenditure, then I do hereby direct my trustee to spend the said surplus in the contribution towards the marriage of the daughters of the poor in my class, and of the poor Brahmins, and towards the education of the sons of the poor amongst my class, and of the poor Brahmins, and other respectable castes as my trustee will think fit to comply." The learned Judge in the Court

(1) GARTH, C.J., and MARKBY, J.

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below considered that all these bequests were valid. We have some doubt whether, if it were necessary to decide the question, we could agree with him as regards the bequests to Pundits holding *tolls*, and for the reading of the Mahabharat and Puran, and for the prayer to God.

It is not, however, necessary for us to decide this point, because the learned Judge has held that the concluding words of the clause commencing thus, "Should there be any surplus after the above expenditure, &c.," must be construed as creating a general residuary bequest, which would absorb the whole of the property, even assuming that some of the preceding bequests were invalid. In this view we quite agree; and, as the appellants could only succeed in the event of there being a surplus undisposed of by the will, we think their suit must be dismissed with costs, and that they must also pay the costs of the motion for the injunction. Their learned Counsel attempted to argue, that in any view of this case they were interested as heirs of the testator in the performance of the *shradhs* of the testators' ancestors; that they were in fact the only persons who could perform those *shradhs*; and that, therefore, they had upon this ground alone a right to the account against the defendant as trustee under the will, which it was one of the objects of this suit to obtain. But as that point was not raised in the Court below, nor mentioned in the plaint, we decline to allow it to be raised here.

[CIVIL APPELLATE JURISDICTION.]

PROSONNO COOMAREE DEBEE AND ANOTHER, PLAINTIFFS ;

AND

SHEIKH RUTTON BEPARY AND OTHERS . . DEFENDANTS.

1877
May 16.1878
January 18.*Landlord and Tenant—Homestead land—Express and Implied Contracts—
Custom—Conduct of parties.*

The nature of a homestead holding must, as between landlord and tenant, be always matter of contract, express or implied. If there is no express agreement, the law implies one determinable at the option of either party; that is, implies that the tenant holds at will, or from year to year, or, in other words, by the landlord's permission upon what may be the usual terms of such holding by the general law or by local custom; and in such a case the tenant is liable to be ejected on a reasonable notice to quit.

The contract which the law implies may be varied by local custom, or by conduct of the parties showing an intention that the tenure is not to be taken as permissive; but these are matters which must in each case be proved, and proved clearly.

Addayto Ohurn Dey vs. Petumber Doss, 17 W. R., 383; *Koylash Chunder Sircar vs. Woomanund Roy*, 24 W. R., 412; *Ramdhun Khan vs. Haradhun Poramanick*, 9 B. L. R., 107; cited and approved.

APPEAL under the Letters Patent from a decree passed by Mr. Justice PRINSEP, affirming a decree of the Officiating Second Subordinate Judge of Dacca, which reversed that of the Second Sudder Moonsiff.

This was a suit brought to eject the defendants from their homestead land on the ground that they had broken the conditions of an agreement alleged to have been entered into by their father with the plaintiff. The issues fixed by the Moonsiff are as follows: (1) Whether notice of ejectment was properly served on the defendants; (2) whether the plaintiffs, who are the *shebait*s of the endowed property, can eject the defendants who are the *ryots* of the endowed property; (3) whether the defendants have held the land from the time of the permanent settlement, and whether the defendants' father has raised earth on the land and built a house; (4) whether the alleged agreement is genuine.

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COOMAREH
DEBEEHAND ANOTHER
v.SHEIKH
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• BEPARY AND
OTHERS.Statement.

The first, second and third issues were found in favour of the plaintiffs; the fourth, in favour of the defendants. On this finding, and also on the ground that the defendants, being homestead tenants, had no right of occupancy, judgment was given for the plaintiffs. On appeal, the Subordinate Judge admitted that there were numerous decisions of the High Court supporting the view taken by the Moonsiff as to the position of a homestead tenant; but he considered those decisions were based upon an incorrect view of the law, and therefore decreed the appeal. The plaintiff appealed specially to the High Court, when the following judgment was delivered by

1877

May 16.

PRINSEP, J.

PRINSEP, J.:—

The plaintiffs sue to eject certain tenants from homestead lands, occupied solely by a dwelling-house and some fruit trees. They bring their suit on a notice served on defendants, in which they state that they want the lands for erection of a cutcherry, and claim their right to re-enter on an agreement said to have been executed by the defendants' father.

The moonsiff held that that agreement had never been entered into, but he also proceeded to hold that, although the defendants had proved that they occupied these homestead lands for fifty or sixty years, inasmuch as they failed to prove that they held the lands from the time of the permanent settlement, or had any right of occupancy, the plaintiffs were entitled to re-enter. In appeal, the Subordinate Judge has found that there was nothing to show that the plaintiffs (landlords) had reserved any right to re-enter; that they had no higher right than those of a purchaser at a sale for arrears of revenue, as laid down in section 37 of the Sale Law (Act XI of 1859); and that, therefore, they were not entitled to re-enter. He, accordingly, set aside the Moonsiff's order. It is admitted in special appeal that the suit has been wrongly brought under the Rent Law, but it is argued that the decision of the lower Appellate Court is contrary to decisions delivered by this Court. I would here remark that the ground on which the plaintiff has sought to eject the defendant, that is, on service of a notice founded on an agreement, has utterly failed, but he is not to fall back on his rights as a zemindar under decisions of this Court.

The two unreported decisions delivered by Mr. Justice MACPHERSON and Mr. Justice BIRCH, which have been read to me are not in point, because the nature of the tenancy is not clear. The next case quoted is from 17 W. R., 383—*Addayto Churn Dey vs. Petumber Doss*, but in that case it appears that the decision of the Court proceeded on the occupancy of the tenant being a permissive occupanoy, and that, accordingly, the landlord was entitled to re-enter whenever he desired to put an end to the tenancy. In the present case we have the fact found by both the Courts that the tenants have occupied these lands by erecting a dwelling-house, and that they have lived therein for the last fifty or sixty years, which *prima facie* gives the tenancy a permanent character; and that this is so considered by the landlord is shown by the fact that he has thought it necessary to come to Court on a special agreement under which he seeks to eject the tenant, but which he has failed to prove. It is perhaps, unnecessary to consider the point; but it appears to me that the ground on which the Subordinate Judge proceeds is correct, and that the landlord is in no better position in this case than a purchaser at a revenue sale, and that the lease of the land on which the dwelling-house has been erected, and which has been occupied for such a length of time, is protected as against the landlords; and this seems to be the view taken in the case reported in 8 B. L. R., 237—*Shibdas Bandapadhya vs. Bamandas Mukhapadhya*. The special appeal is accordingly dismissed, but without costs, as the respondent does not appear.

The plaintiff appealed under section 15 of the Letters Patent on the ground, *inter alia*, that the learned Judge was under a misapprehension in inferring from the Court fee paid on the plaint that the suit was brought under the Rent Law.

Baboo *Bassanto Coomar Bose*, for Appellant.

The Respondent did not appear.

The judgment of the Court (1) was delivered by

GARTH, C.J.:—

In this case we are of opinion that the appeal should be

(1) GARTH, C.J., and BIRCH, J.

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Judgment.
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GARTH, C.J.

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decreed. The suit was brought by the plaintiffs to eject the defendants from certain homestead land after due notice to quit. The facts of the case were, that the defendants, their father and grandfather, had been occupying the land under the plaintiffs (who are *shebails* of the property), for fifty or sixty years at a certain rent. The property consisted of a dwelling-house and several fruit trees of many years' growth, but it does not appear by whom the house was built or the fruit trees planted. The defendants' case was, that their father had raised earth upon the land and built the house; but this is disbelieved by the Moonsiff, and the Subordinate Judge does not question the correctness of his finding in this respect. The defendants also contended, that they and their ancestors had held the land from the time of the permanent settlement; but this again has been negatived by the Moonsiff, and the lower Court has apparently approved his decision. On the other hand, the plaintiffs set up an *ikrar*, alleged to have been given to them by the father of the defendants, agreeing not to kill cows on the property on pain of being ejected. But this document is disbelieved and negatived by both Courts. So that we must take the established facts to be, that the defendants, their father and grandfather, have been occupying this land for fifty or sixty years; that it has been used as a homestead, consisting of a house and fruit trees; that there is no evidence as to the origin of the tenancy, nor (except as to the amount of rent), as to the terms of it; and that it does not appear who built the house or planted the fruit trees. The notice to quit has been proved; and no objection has been taken that any longer notice to quit was required by law. Upon these facts the Moonsiff has decreed in favour of the plaintiffs.

The Subordinate Judge has reversed that decision, and has delivered a judgment which, in our opinion, is not only contrary to law, but which we cannot refrain from characterizing as being wilfully perverse and disrespectful to this Court. He begins by saying that he is aware of numerous decisions of the High Court, in which it has been held that, as homestead tenants have no right of occupancy under section 6 of the Rent Act, they are to be treated as tenants-at-will, and liable to ejectment at the landlord's pleasure.

He then, professing the utmost deference and veneration for this Court, proceeds to lay down the law and pronounce a judgment directly in opposition to the decisions to which he refers, and that without even condescending to examine those decisions, or attempting to distinguish them from the case with which he is dealing. He takes upon himself to lay down the proposition broadly, that by the law of this country the right of a homestead tenant to occupy his holding permanently becomes absolute so soon as he is allowed to erect his dwelling-house by his landlord, whether he holds under a verbal agreement or a written lease; and professing to act upon this rule he reversed the Moonsiff's judgment and dismissed the plaintiffs' case.

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Now it must be noted in the first place, that here it is not found as a fact that either the defendants or their ancestors built the house which stands on the land in question. The Moonsiff negatived the defendants' statement in that respect, and the Subordinate Judge does not find it to be proved; but apart from this consideration, there is no law of which we are aware in this country, which converts a holding at will or from year to year, or for a term of years, into a permanent tenure, merely because the tenant, without any arrangement with his landlord, chooses to build a dwelling-house upon the land demised.

Such a law, if it existed, would in a large number of cases lead to great injustice and inconvenience, and would often leave land-owners entirely at the mercy of their ryots. Small *katcha* dwellings in this country may be erected in a short time, and at a very trifling expense; and if a landlord, as soon as he or his agent discovers such a dwelling to have been erected, were obliged on the one hand to turn the tenant out or make him pull down his house, or on the other hand, as the only alternative, to allow the tenant's permissive holding to become a permanent tenure, the consequences would often be disastrous to tenants, or very unjust to landlords.

The truth is, that the nature of a holding as between landlord and tenant, must always be matter of contract, either express or implied. If they enter into an express agreement of tenancy, either written or verbal, such agreement generally defines the terms of the holding. If, on the other hand, a tenant is let into possession without any express agreement and pays rent, he becomes a

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tenant-at-will or from year to year, or in other words holds by the landlord's permission upon what may be the usual terms of such a holding by the general law or by local custom; and in such a case he is of course liable to be ejected by a reasonable notice to quit. Occasionally, there are local customs by which special terms and incidents are engrafted upon the contract of tenancy; but the existence of the custom in such cases must be a matter of proof, and no Judge has a right to act upon such customs, unless their existence is duly established. In this case no such custom is even suggested; and, as there was no express agreement of tenancy, and no evidence of its origin, the defendants must be considered as holding from year to year, and liable to be ejected by a proper notice to quit.

The Subordinate Judge has cited several texts from Manu and Vrihaspati, which appear to us to have nothing to do with the question. They apply to cases of forcible and criminal trespass and dispossession, and do not profess to regulate the ordinary relations between landlord and tenant, or to deal with cases of dispossession by legal process. What the Subordinate Judge says with regard to the statutory law of this country is also beside the question. The Legislature has undoubtedly in several instances protected from sale or confiscation lands held under *bond fide* leases at fair rents for building purposes, continuing to be used for those purposes; but these enactments have nothing to do with the present case, in which, as far as we can see, no building agreement of any kind was ever made between the parties. The truth is, that if a tenant wishes to build dwelling-houses upon his land, he should take care to make a proper arrangement accordingly with his landlord. He has no right to hire his land for one purpose upon an ordinary permissive holding from year to year, or at will, and then, by using it for another purpose, to convert it at his own option, and without consulting his landlord's wishes, into a permanent tenure. Such a law, if it were in force, would be manifestly unjust to the landlord, and would lead to much litigation and inconvenience.

The case of *Addayto Churn Dey vs. Petumber Doss*, 17 W. R., 383, decided by Justices LOUIS S. JACKSON and GLOVER, is in the circumstances very similar to the present, except that in that case

it was proved, (which it has not been here) that the defendant had built a *kutchu-pucka* wall upon the land of the value of Rs. 500, and that the defendant's father and grandfather had occupied the disputed land by raising houses upon it for upwards of two generations, embracing a period of thirty or thirty-two years. Nothing is said in that case as to the defendant or his predecessors having paid any rent, but we must assume that they did so, otherwise they would have acquired an independent title by adverse possession. In other respects, the tenancy was an ordinary one, as it is here, for no fixed period, and in the absence of proof to the contrary, it was held to be permissive, that is, as we understand it, at will or from year to year. Under these circumstances, it was held by the learned Judges that the defendant was liable to be ejected in the ordinary way, and that the fact of his having built the wall, and of his ancestors having erected the house, placed him in no better position than he would have been under his original holding. (See also to the same effect the cases of *Koylash Chunder Sircar vs. Woomanund Roy*, 24 W. R., 412; *Ramdhun Khan vs. Haradhun Poramanick*, 9 B. L. R., 107).

In some instances, no doubt, either from expressions used in the contract of tenancy, or from the fact of land having been let by a landlord expressly for the purpose of the tenant's building *pucka* houses upon it, such circumstances, coupled with a long and uninterrupted possession by the original grantee and his descendants, have been held to raise a presumption, that the tenure was intended to be permanent; but such cases often create doubt and difficulty, and it is always far safer for a tenant, if he means to build, to have the terms of his tenure clearly defined by a written instrument.

We are unable to appreciate the grounds upon which the decision of the learned Judge of this Court, which is now under appeal, has attempted to distinguish the facts of this case from those of the authorities to which he has referred. In those cases, as in this, there was no evidence that the tenant held for any particular time; he held at a rent in the ordinary way, and did not give any evidence to show that his holding was of a permanent character, or for any defined period. Under these circumstances,

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his tenancy was considered to be at will, or from year to year; or in other words, permissive, at his landlord's pleasure. We consider that the case in 17 W. R., 383, is wholly undistinguishable from the present. The judgments of both Appellate Courts are reversed, and the judgment of the Moonsiff restored, with costs in each Court.

Judgment.

GARTH, C.J.

[CIVIL APPELLATE JURISDICTION.]

MAHARAJAH BIRCHUNDER MANICKYA }
 BAHADOOR } PLAINTIFF;

AND

HURRISH CHUNDER DOSS DEFENDANT.

1877
 August 15.
 December 5.

Suit for Arrears of Rent—Ex-parte Decree—Evidence—Estoppel.

A sued B for the rent of 1278 and got an *ex-parte* decree, which he never executed and which became barred by limitation. A afterwards sued for the rent of 1279, and tendered the then barred *ex-parte* decree as evidence of the amount due. On a question which arose as to its admissibility in evidence, and the value to be attached to it: *Held*, the *ex-parte* decree, though barred by limitation was, for the purposes of evidence, as good as any other decree, unless shown to have been irregular, contrary to natural justice, or fraudulently obtained.

A decree obtained *ex-parte* is, in the absence of fraud or irregularity, as binding between the parties, for the purposes of evidence and estoppel, as any other decree.

Maharajah Birchunder Manick vs. Ram Kishen Shaw, 23 W. R., 128, considered and explained.

If a defendant does not think it worth while to contest a suit, but allows the plaintiff's evidence, and the judgment passed upon it, to go unquestioned, he has no right afterwards to dispute the correctness or the value of the judgment, merely because he chose to absent himself from the trial.

Nobo Doorga vs. Fyz Buksh Chowdhry, 24 W. R., 403, cited and approved.

APPEAL under the Letters Patent from a decree passed by Mr. Justice AINSLIE, affirming that of the Judge of Tipperah, which modified a decree passed by the Moonsiff of Kushba Noor-nuggur.

This was a suit for rent for 1279 F. The plaintiff put in evidence an *ex-parte* decree for the rent of 1278, which he had obtained against the defendant, as evidence of the rate of rent to which he was entitled. This decree had become barred by limitation, and was rejected as inadmissible by the lower Appellate Court, who reversed the Moonsiff's decision on that ground. The

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—
Statement.

case having come to the High Court on special appeal, the point was referred to a Full Bench, where it was ruled that the decree was admissible in evidence, and that the value to be attached to it was a matter to be determined by the lower Court (see 23 W. R., 129).

The case was then remanded to the lower Appellate Court, and the Judge admitted the decree in evidence, but decided that it was of no value, apparently on the ground that the suit in which it was obtained had not been contested by the defendant. The case was sent by the lower Appellate Court to the Moonsiff, where other evidence was given, and a decree obtained by the plaintiff at a much less rate of rent than he had originally claimed. This decree was reversed by the District Judge, who gave the plaintiff a higher rate of rent, yet not as much as allowed by the decree obtained in the suit for the arrears of 1278. Defendant appealed specially to the High Court,—plaintiff filing a cross-appeal,—when the following judgment was delivered by

AINSLIE, J. AINSLIE, J. :—

The special appeal rests on five grounds, the first of which is that the defendant in his written statement distinctly pleaded that the jumma of the tenure had not been changed. It is admitted that the pleading was not drawn up as it should have been, under section 16 of the Rent Law, but was a special pleading that the jumma had not been changed within twenty years, the defendant, who was a talookdar, erroneously supposing that he was able to claim the benefit of the presumption created in favour of ryots by section 4, Act VIII (B.C.) of 1869. The ground which is now taken in special appeal was not really taken in the written statement.

The second point taken was that the Judge was wrong to decree at an average rate of Re. 1 without proof of the actual collections by the defendant from the ryots. It appears to me that under the circumstances the Judge was not in error. The defendant, as talookdar, being in immediate communication with the ryots, had in his own possession all the materials necessary for establishing precisely the exact amount which he collected from year to year. All that the plaintiff could do was to give general evidence of what these collections probably would be, and as the

defendant did not produce and establish his collection papers the Judge was justified in framing the decree on the general evidence given by the plaintiff.

It is further said that no notice of enhancement has been served upon the defendant before the institution of this suit. The Judge has throughout his judgment spoken of this as an enhancement suit, but it is quite clear that he is in error on this point. There was a decree for the rents of the year 1278, and in this present suit the rents of the year 1279 are claimed at the rates mentioned in that decree. Although that decree was *ex-parte*, yet it has never been set aside as fraudulently or dishonestly obtained. The fact that it was not put into execution is immaterial; the only result is, that the plaintiff has lost a certain sum of money; but as far as the decree declared what was the amount payable by the defendant to the plaintiff for the year 1278, it, as admitted by the Judge, stands good.

The rent for 1278 then being fixed at Rs. 74 odd annas, the claim for the same rent for the year 1279 cannot in any sense be called a suit for enhanced rent, and consequently no notice was required.

Then it is said that the enhancement has been made upon wrong grounds; that the Court was bound to take into consideration the rents payable by other talookdars of similar degree in the neighbourhood, and ought not to have proceeded upon evidence as to the increased production of the land. This, however, is entirely a new point raised at the end of four and a half years' litigation, and cannot now be entertained.

Lastly, the special appellant urges that it is not for him to prove what was the actual income, but for the plaintiff. It appears to me that the answer to that is simple. When one party has in his possession, of necessity, the means of proving that which is necessary to establish the affirmative or the negative of a certain issue, the burden of proof is thrown upon him.

In cross-appeal it was urged that the Court below was wrong in not giving some weight to the decree for the year 1278, and that if the Judge had done so, the rest of the evidence considered by the light of that decree would have been in favour of the plaintiff. On turning to the remand order in which the Judge

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MAHARAJAH
BIRCHUNDER
MANICKYA
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—
Judgment.

—
AINSLIE, J.

considered the weight to be given to the previous decree, it seems to me that he there held that in the present case that decree was really of no value, because it had been given without entering into any discussion of the question now at issue, and upon which evidence has been tendered on either side, and that it cannot in any way guide him to a decision on the evidence in this case. The appeal is dismissed with costs.

Plaintiff appealed under section 15 of the Letters Patent, on the ground that he was entitled to the rent which had been awarded to him by the *ex-parte* decree.

Baboo Bhairab Chunder Banerjee, for Appellant.

Baboo Hurry Mohun Chuckerbutty, for Respondent.

1877

December 5.

The judgment of the High Court (1) is as follows :—

We think that in this case the lower Court is in error, through misconstruing the meaning of the Full Bench decision. The plaintiff sued the defendant for rent due for the year 1279, at the same rate which had been decreed to him for the previous year, 1278, in a suit which he had brought against the same defendant for rent of the same property; and the plaintiff relied upon that former decree as almost conclusive evidence of the proper amount due to him from the defendant. It seems that this decree, for the rent of 1278, was obtained by the plaintiff *ex-parte*, the defendant not appearing at the trial; and it is admitted that no execution had ever been taken out by the plaintiff upon that decree, and his right to take out execution has been barred by limitation. The Court of First Instance held that this decree was evidence against the defendant in the present suit; and gave judgment for the plaintiff for the same amount decreed, viz., Rs. 74. The Officiating Judge on appeal reversed the Moonsiff's judgment, on the ground that, as no steps had been taken by the plaintiff to execute the decree for the rent of 1278, and the period of limitation had been allowed to elapse, the decree itself became inoperative, and could not be kept alive for purposes of evidence, any more than for purposes of execution. This view was supported by a case reported in 10 W. R., 215; and when that case came up to the High Court on special appeal, the point thus decided by the Judge

(1) GAETH, C.J., and BIRCH, J.

was referred to a Full Bench, and their decision upon it is reported in 23 W. R., 128—*Maharajah Beer Chunder Manick Bahadoor vs. Ram Kishen Shaw*. COUTH, C.J., says: "We are of opinion that the decree is admissible in evidence. The question of its value when admitted is to be determined by the lower Court. The defendant has alleged that it was obtained fraudulently. It does not appear that he gave any evidence, and it will be for the Court to say whether there is any evidence of that allegation. The decree of the Officiating Judge must be reversed, and the suit remanded to him for re-hearing."

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 BIRCHUNDEE
 MANICKYA
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 v.
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 CHUNDER.
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 —
 Judgment.

The case then went back to the Officiating Judge, and he found—apparently upon no other grounds than that the decree had been obtained *ex-parte*, and that no evidence had been given on the part of the defendant at the former trial—that the decree was of no value, and ought to be disregarded. The case was then remanded by the lower Court to the Moonsiff to try the question of amount *de novo* without reference to the former decree; and this resulted, after a long litigation, in the plaintiff recovering Rs. 49, being a much smaller sum than was adjudged to him by the former decree. Now, in dealing with the decree in this way, we consider that the Judge was practically ignoring the true meaning of the High Court's judgment. The High Court were perfectly aware that the former decree was made *ex-parte*. They knew that the decree had passed without any evidence on the part of the defendant; and if that fact had been sufficient to invalidate the decree, or to render it of no value for the purposes of evidence in the present suit, they would of course have said so, and would not have remanded the case to the Officiating Judge for re-trial. What the Full Bench judgment, in our view of the matter, really meant, was this, that an *ex-parte* decree is *prima facie*, for purposes of evidence, as good as any other decree; and as binding between the parties upon the matter decided by it. But that if the defendant could show, as he said he was prepared to do, that the former decree was obtained by fraud, or that it was irregular or contrary to natural justice, the *ex-parte* decree, although of force between the parties in the suit in which it was given, might be properly considered as of no value for the purposes of evidence in any other suits. It seems clear that this was the meaning of the Full Bench; because, while they knew

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—
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that the former decree had been obtained *ex-parte*, and, therefore, evidently considered that fact alone as insufficient to destroy the value of the decree for purposes of evidence, they say that the defendant alleged that the decree had been obtained by fraud, and that it must be for the Court below to say whether that allegation was proved. But when the case came again before the Officiating Judge, it does not appear that the defendant gave any evidence of fraud, or that he made any attempt to show that the decree in the former suit had been obtained otherwise than honestly and properly. The Judge pronounced the decree to be of no value as evidence, merely because it had not been contested by the defendant.

In this case, we consider he was quite wrong. A decree obtained *ex-parte* is, in the absence of fraud or irregularity, as binding for all purposes as a decree in a contested suit. If it were not so, a defendant in a rent suit might always, by not appearing and allowing judgment to pass against him without resistance, prevent the plaintiff from ever obtaining a definitive judgment as to what is the proper amount of rent due from him to his landlord. If a defendant does not think it worth while to contest the suit, but allows the plaintiff's evidence and the judgment passed upon it to go unquestioned, he has no right afterwards to dispute the correctness or the value of the judgment, merely because he chose to absent himself from the trial. Of course, if any fresh circumstances had arisen since the former decree was made, which would justify, on the one hand, an abatement or, on the other hand, an enhancement of the rent decreed in the former suit, the Court would be bound to take such circumstances into consideration. But no evidence of this kind was adduced by the defendant in the present case. The only materials which he brought forward, upon which the judgment of the Court below ultimately proceeded, consisted of evidence which the defendant might and could have brought forward, if he had so pleased, in the former suit, and which he offered no excuse for not producing on that occasion. We think, therefore, that the principle upon which we decided the case of *Nobo Doorga vs. Fyz Buksh Chowdhry*, 24 W. R., 403, and which has been acted upon by this Court in other cases, applies with equal force here.

We consider, for the reasons given by the learned Judge in the Court below, that no notice of enhancement was necessary before bringing this suit, and we think that the Moonsiff was right in the first instance in adjudging to the plaintiff the same rate of rent as was decreed to him in the former suit. The decree will, therefore, be altered in that respect ; but as this long series of litigation has arisen from the misconception of the Full Bench judgment by the Officiating Judge, we think that each of the parties should pay their own costs of the proceedings subsequent to that judgment.

1877

MAHARAJAH
BIRCHUNDER
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DOSS.*Judgment.*

[CIVIL APPELLATE JURISDICTION.]

PARBUTTY NATH ROY CHOWDHRY } PLAINTIFFS ;
 AND OTHERS }
 AND
 MUDHOO PAROL AND OTHERS DEFENDANTS.

1877
 April 27.
 —

1878
 January 9.
 —

Julkur—Easement—Limitation—Act IX of 1871, section 27.

A *julkur* is not an easement within the meaning of Act IX of 1871, section 27.

Plaintiffs were proprietors of a certain lake, the right of fishing in which they let out to tenants. In this lake the defendants fished for eighteen years adversely to, but with the knowledge of, the plaintiffs: *Held*, that a suit to have it declared that plaintiffs were entitled to the *julkur*, and that the defendants had no right to fish therein without their permission, was barred by limitation.

APPEAL under the Letters Patent against a decree passed by Mr. Justice AINSLIE, affirming that of the Officiating Additional Judge of 24-Pergunnahs, which reversed a decree of the Second Moonsiff of Bussirhaut.

The facts of this case are sufficiently set forth in the above head note, and in the judgments of the High Court. The question in the case was whether a *julkur* is an easement within the meaning of section 27 of the Limitation Act, Act IX of 1871.

The following judgment was delivered by

1877
 April 27.
 —

AINSLEE, J.

AINSLEE, J. :—

The plaintiff in this suit seeks to recover the rents of a certain *julkur* from the defendants, who, in answer, allege that the *julkur* is the property of Government; and, if this is not so, that they have never paid rents to, and do not hold from, the plaintiff. The Judge of the lower Appellate Court has found that with the knowledge, but without the permission, of the plaintiffs the defendants have been fishing in this water for at least eighteen years adversely to plaintiff, and that the law of limitation bars this suit.

It has been urged in special appeal that the plaintiffs, having enjoyed possession through other tenants, cannot be barred. I think, however, that where property is of such a nature that there

may be equal enjoyment thereof by several persons at one and the same time, without necessary interference one with another, it is not necessary for defendants to establish the total exclusion of the plaintiffs in order to succeed on the plea of limitation. If, as in this case, the defendants can show that, while plaintiff may have been enjoying profits out of this fishery through others, they themselves have, within the knowledge of the plaintiff, been appropriating the entire produce of their own fishing in the same waters without in any way acknowledging plaintiffs' title, they do in effect prove an adverse possession *pro tanto*. It was, however, further argued that possession for twenty years is necessary to establish a prescription; but, as the law now stands, the case does not fall within the provisions of section 27 of the Limitation Act, and must, therefore, be governed by article 145. The Judge correctly observes that the right claimed is not an easement; and, although in the draft of an amended Law of Limitation recently published, (1) the meaning of the word easement is extended to include such claims; it has as the law now stands a more restricted meaning. As the Judge has found that the enjoyment of the fishery has not been by license or consent of plaintiffs, but, on the contrary, accompanied with a denial by plaintiffs of the defendants' right to fish, and a denial by defendants of plaintiffs' right to interfere with or tax their fishing, and that this state of things has been going on for eighteen years, the suit was rightly dismissed. The appeal is dismissed with costs.

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 —
Judgment.
 —
 AINSLIE, J.
 —

Plaintiff appealed under section 15 of the Letters Patent.

Baboo Chunder Madhub Ghose, for Appellants.

The Respondents did not appear.

The judgment of the High Court (2) was delivered by

GARTH, C.J.:—

We have felt some difficulty in coming to a conclusion upon

(1) ACT XV OF 1877, SECTION 3, PARA. 3—'Easement' includes also a right, not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or any thing growing in, or attached to, or subsisting upon, the land of another.

(2) GARTH, C.J., and BIRCH, J.

1878
 January 9.
 GARTH, C.J.

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—
Judgment.

—
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this case, partly from the peculiar nature of the rights claimed by the plaintiffs, and partly from there being no provision in the Limitation Act of 1871 which applies to, or contemplates, a suit of this nature. The plaintiffs claim to be entitled to an 8-anna share of certain *julkur*; and they pray for a declaration as against the defendants, that they are entitled to receive rent from them for fishing in their *julkur*, or that the defendants have no right to fish there without paying them (the plaintiffs) rent; or in other words, that the plaintiffs are entitled to enjoy their *julkur* rights without the defendants' interference.

The Moonsiff very properly dismissed the first portion of the plaintiffs' claim, upon the ground that the defendants were not, and had never claimed to be, the plaintiffs' tenants; but he decreed their claim in the alternative, declaring in substance that the plaintiffs had a right to the share which they claimed in the *julkur*, and that the defendants could not fish there without the plaintiffs' permission. He holds that the right of fishing claimed by the defendants in the *julkur* was at most an easement; that the defendants, therefore, could not become entitled to it by prescription, till they had enjoyed it as of right for 20 years, (see Limitation Act of 1871, section 27); and that their user and enjoyment of it had not been proved for more than eighteen years. The Additional Judge in appeal reversed this decision of the Moonsiff. He held that neither the right of fishing claimed by the defendants nor the *julkur* rights claimed by the plaintiffs were "easements." He apparently considered that the enjoyment of the right of fishing by the defendants was an interference by them with the exclusive right claimed by the plaintiffs; and, ultimately, that, as the plaintiffs had not brought their suit to establish such exclusive right within twelve years of the defendants' first interference, their suit was barred by limitation, and ought to be dismissed. The learned Judge of this Court has approved the finding of the lower Court, and substantially upon the same grounds.

It has now been urged before us, on appeal from his decision, first, that the *julkur* which the plaintiffs claim is not in its nature immoveable property, or an interest in such property within the meaning of the Limitation Act; and that, consequently, ~~the~~

145 of the second schedule to the Act does not apply ; secondly, that a *julkur* is an easement to which the defendants could only become entitled by a twenty years' user (section 27 of the Limitation Act of 1871) ; and, thirdly, that the acts of the defendants when fishing in the *julkur* were only a series of trespasses or infringements of the plaintiffs' right, each of which was a successive cause of suit, and that therefore the plaintiffs are not barred by limitation.

We think, however, that the lower Appellate Courts are right in the view which they have taken. Whatever may be the law under the present Limitation Act, a *julkur* is clearly not an easement within the meaning of section 27 of the Act of 1871. An easement is defined by Mr. Gale in his Law of Easements (page 5) to be "a privilege without profit," which the owner of one tenement may enjoy (as a right of way or of light) over the land of another, but "comprising no right to a participation in the profits arising from it." Now a *julkur*, on the other hand, is the right to take the profits of a river, lake or other water on a particular estate or tract of country ; and, although, (as was decided by Justices JACKSON and McDONELL in the case of *Radha Mohun Mundul vs. Neel Madhub Mundul*, 24 W. R., p. 200) the right to a *julkur* may not involve any actual property in the soil over which the water flows, it is still, we think, an interest in immovable property within the meaning of Article 145 of the Limitation Act. We also agree with the lower Appellate Court that the acts of the defendants in taking fish from this *julkur* for so many years cannot properly be considered as successive acts of trespass. They appear to have been exercised continuously under a claim of right, and in the only way in which that right could be effectually asserted.

Assuming that the plaintiff's possession of the *julkur* consisted of the perception of the profits derivable from it, the enjoyment by the defendant of a partial perception of those profits for a long course of years must be considered (as Mr. Justice AINSLIE describes it) "as a dispossession by the defendants of the plaintiffs' right *pro tanto*," during that period. The plaintiffs ought, therefore, to have brought their suit within twelve years from the commencement of such dispossession. The appeal is dismissed without costs, no one appearing for respondents.

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—
Judgment.

—
GARTH, C.J.

[CIVIL APPELLATE JURISDICTION.]

1877
August 1. HIRA LALL PARAMANICK AND OTHERS . . PLAINTIFFS;
AND

1878
January 18. BARIKUNNISSA BEEBEE DEFENDANT.

*Jurisdiction—Presumption—Lakhiraj lands—Resumption and Assessment—
Indian Evidence Act, sections 101, 103, 107—Regulation XIX of
1793, section 9.*

In 1862 plaintiff got a decree in a resumption suit against defendant's predecessor, declaring his right to assess certain lands. In 1874 he brought a suit for assessment of the same lands, and, the question of jurisdiction having been raised, one of the issues framed was: "Whether the resumed *lakhiraj* was of date anterior to the permanent settlement." *Held*, that it did not lie on the plaintiff to show that the Civil Court had jurisdiction to entertain the suit, by proving that the grant had been made since the permanent settlement; but that it lay on the defendant to show that it had not, because (1) the affirmative of the issue was asserted by the defendant; and because (2) the terms of the *lakhiraj* grant under which the defendant claimed would be more within his knowledge than within that of the plaintiff.

In such cases, if any presumption were to be made as regards jurisdiction, it would be in favour of the ordinary and general tribunals of the country, to the exclusion of any special jurisdiction to be exercised under a particular Statute by the Collector.

APPEAL under the Letters Patent from a decree passed by Mr. Justice AINSLIE, reversing that of the Judge of Moorshedabad, which reversed a decree of the Second Moonsiff of Berhampore.

This was a suit for assessment of rent on certain lands in respect of which plaintiffs had in the year 1862 obtained a decree, declaring that they were entitled to assess them. That decree, which was the only part of those earlier proceedings put in evidence in the present suit, was silent as to the date of the grant; and the question arose as to whether it was made before the permanent settlement, in which case the Collector was the proper person to assess, under Regulation XIX of 1793, sec-

tion 9, or whether the grant was made after the permanent settlement, when the Civil Court would have jurisdiction. To determine this point the Moonsiff settled the following issue, namely: "Whether the resumed *lakhiraj* was of a date anterior to the 1st of December 1790;" and, on plaintiffs' failing to prove that the grant was of a later date, dismissed the suit on the ground of want of jurisdiction. Plaintiffs appealed to the Court of the District Judge, who remanded the suit on the ground, *inter alia*, that the onus of proving the above issue should have been placed on the defendant. The case was then brought in special appeal to the High Court, when the following judgment was delivered by

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NISSA BEEBEE.
Statement.

AINSLIE, J.:—

It appears to me that the judgment of the first Court was right in this case. There was a decree for resumption of land as far back as 1862. The plaintiffs took no steps upon that decree until twelve years had nearly run out. They now bring this suit to have the rent assessed. The only part of the answer with which we are now concerned is that which denies the jurisdiction of the Court. When suits are brought to resume *lakhiraj* lands, and a decree is obtained, the consequence is that the rent will either be assessable under the provisions of section 9 of Regulation XIX of 1793, by the Collector, or in the ordinary way in which questions of rent may be determined between a landlord and tenant. The decree in this case does not show on the face of it whether the rent is to be dealt with by the Revenue Officer or by the Civil Court. Very possibly, it would be apparent, if the whole of the proceedings in the resumption suit were examined, what the nature of the claim and the result of the decision was, but those proceedings have not been made evidence in this case. The objection was raised distinctly in the written statement; and, although no issues were at first laid down on the point in the amended issues recorded on the 29th of March 1875, the ninth issue is distinctly framed for the purpose of having it tried. The decision in this case was not given by the first Court till the 29th of April following, so that there was ample time for the plaintiffs to produce all the necessary materials on which they

1877
August 1.
AINSLIE, J.

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 ———
Judgment.
 ———
 AINSLIE, J.
 ———

could rely to show that the Court had jurisdiction to deal with the case. I fail altogether to see why this case should be dealt with differently from other cases in which the question of jurisdiction arises.

The power of the Court to deal with the suit being impugned, it must be shown by the plaintiffs that the Court has jurisdiction in the matter. The appeal is allowed, and the decree of the first Court restored with costs.

Plaintiffs appealed under section 15 of the Letters Patent.

Baboo Gooroo Doss Banerjea, for Appellant.

Mr. H. E. Mendies, for Respondent.

The following judgment of the High Court (1) was delivered by

1878
 January 18.
 GARTH, C.J.

GARTH, C.J.:—

So far as the merits of this case are concerned, we are not called upon here to adjudicate upon them. The Moonsiff has determined the rate of rent which is payable by the defendant, and the District Judge, in his judgment of the 14th February 1877, says that, as regards the Moonsiff's decision on remand, in which the merits of the case were discussed and settled, the defendant did not raise any question before him. The only point therefore which could be, or has in fact been, raised on special appeal in this Court is that of jurisdiction, which was determined in a former judgment of the Officiating Judge, dated the 13th of May 1876, in favour of the plaintiffs. That judgment has been reversed by the learned Judge of this Court, and we have to consider the correctness of his judgment upon that point only.

The question arises in this way:—The plaintiffs, in the year 1862, brought a resumption suit against the defendant's mother, (under whom the defendant claims), in respect of the lands in dispute, upon the ground that she was holding them by an invalid *lakhiraj* title. The defendant in that suit contested the claim, but the plaintiffs obtained a decree. It does not appear from the proceedings in that suit whether the *lakhiraj* grant, under which

(1) GARTH, C.J., and BIRCH, J.

the defendant claimed, was before or after the year 1790 ; but it was distinctly stated in the decree that the plaintiffs (the decree-holders) were entitled to assess the property. The plaintiffs then, after a lapse of some years, brought this suit against the present defendant (who claimed under the defendant in the resumption suit), to have the rent assessed, and the defendant then set up (by way of plea to the jurisdiction of the Civil Court) that the *lakhiraj* grant under which the defendant in the resumption suit claimed was previous to 1790. The Moonsiff, accordingly, framed the ninth issue in the case in these words : " Whether the resumed *lakhiraj* was of a date anterior to the 1st of December 1790 ? "

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—
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The Moonsiff considered that the onus of proving the negative of this issue was upon the plaintiffs ; apparently, because he thought that the plaintiffs ought to prove that the Civil Court had jurisdiction to try the suit ; and as the plaintiffs did not prove the negative of the issue, the Moonsiff dismissed the suit. On appeal, the Officiating Judge reversed the Moonsiff's decision, and remanded the case to be tried upon the merits. He considered that the case of *Ranee Shama Soondaree vs. Seetul Khan*, 15 W. R., 474, was an authority in the plaintiff's favour, and that the onus of proving the ninth issue lay upon the defendant. On special appeal, the learned Judge of this Court thought the Officiating Judge was wrong ; and he restored the Moonsiff's first judgment upon the ground that, as the jurisdiction of the Court to entertain the suit had been impugned, it was for the plaintiffs to prove that the Court had jurisdiction.

After fully considering the point, we are unable to agree in the learned Judge's conclusion. The objection made to the jurisdiction of the Court was raised affirmatively by the defendant by a statement that the *lakhiraj* grant was previous to 1790. The affirmative of the ninth issue, which was framed to meet that allegation, was asserted by the defendant ; and by the 101st and 103rd sections of the Evidence Act, the burthen of proving any particular fact in issue lies upon the party who asserts that fact. Moreover, in this case, the rule laid down in section 106 of the Evidence Act is in favour of the plaintiff's view ; because, if the defendant and her ancestors held and claimed to hold this property

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—
Judgment.
—

GARTH, C.J.

under a *lakkiraj* grant, the terms and the date of that grant would certainly be rather within the knowledge of the defendant than of the plaintiff. It is perfectly true, as observed by the learned Judge, that if the grant had in fact been made previously to 1790, the Collector's Court would have had jurisdiction to assess the revenue upon the property. But this fact raises no presumption in favour of the grant having been made prior to 1790; on the contrary, if any presumption were to be made as regards jurisdiction, it would be in favour of the ordinary and general tribunals of the country, to the exclusion of any special jurisdiction exercised under a particular Statute by the Collector; and if any presumption could be made in this case from the proceedings in the resumption suit, it would certainly be in favour of the plaintiff; because the decree in that suit contains a declaration "that the plaintiff is entitled to assess the lands." We think, therefore, that, having regard to the rules laid down by the Evidence Act as well as to the general law and the circumstances of this particular case, the onus of proving the affirmative of the ninth issue was upon the defendant. The judgment of the High Court will, therefore, be reversed, and the judgment of the District Court restored with costs in both Courts.



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 FAILURE TO TAKE OUT. (1), (2) 252, [408]
 — I of 1872, section 25. See CONFESSION. 21
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 TENANT ... 538
 — IX of 1872—
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- X of 1872 (Code of Criminal Procedure)—
 Section 34, cl. iv. See SUMMARY TRIAL (2) ... 434
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 Section 250. See EXAMINATION OF ACCUSED. (2) ... 436
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 Section 266. See STOLEN PROPERTY ... 339
 Section 296. See COMMITMENT, ORDER OF ... 93
 Section 297. See DISCHARGE, ORDER OF ... 83
 Sections 418, 419. See STOLEN PROPERTY ... 339
 Section 453. See JOINDER OF CHARGES ... 478
 Section 505. See BAD LIVELIHOOD. (2) ... 268
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 Section 509. See GOOD BEHAVIOUR, SECURITY FOR ... 95
 Sections 518—520. See LOCAL NUISANCE ... 53
 Section 521. See WITHDRAWAL OF ORDER ... 486
 Section 530. See POSSESSION. ... 136
 Section 531. See ATTACHMENT. (1) 86
 Section 536. See MAINTENANCE OF CHILD ... 89
- XI of 1876, Sections 17, 20, 21. See BANK OF BENGAL ... 507
- I of 1877, section 21. See SPECIFIC PERFORMANCE ... 384
- X of 1877—
 Section 108. See APPEAL ... 402
 Section 230. See LIMITATION. (2) 475
 Section 311. See APPLICATION. ... 250
 Sections 334, 335. See SALE. ... 460
 Section 483. See ARREST BEFORE JUDGMENT ... 336
 Section 540. See APPEAL. 402
 Section 595 (a.) See APPEAL TO PRIVY COUNCIL. ... 354
- XV of 1877, Sec. II, Art. 85. See PARTNERSHIP.

Adverse Possession—Co-sharer—Limitation—Secondary Evidence.] When one co-sharer sets up as against another adverse possession of land which had previously been waste, but at some former time had been occupied and then been admittedly held jointly, it is for him to show that he has held possession in such a way as to give distinct notice to his other co-sharers of his intention to set up a title adverse to them. Secondary evidence of a document should not be admitted unless the absence of the original

Adverse Possession—continued.

is sufficiently accounted for. **RAKHAL DASS BUNDOPADHYA v. INDRU MONER DEBI** ... 155

2. ———— See REFORMATION ON OLD SITE ... 259

3. ———— *Co-sharers—Sole Possession.* Exclusive possession by A, of property which originally had been admittedly joint, does not, *per se*, amount to adverse possession as against A's co-sharers. The Court should further ascertain whether A's exclusive possession was due to his title being really a separate one from the plaintiff's, and could not be accounted for by the fact of some arrangement having been come to at a previous time between the parties. **SHEIKH ASUD ALI KHAN v. SHEIKH AKBAR ALI KHAN** ... 364

4. ———— *Limitation—Res Judicata.* A took and held possession of land adversely to B, and afterwards let it in *patni* to C. B brought a suit for possession against A; and, having obtained a decree, attempted to execute it by turning C out of possession. Between the date on which A originally took adverse possession of the land, and the date on which B attempted to turn C out of possession, more than twelve years had elapsed. *Held*, that B's claim against C was barred by limitation; and that C was not bound by the decree obtained by B against A, not having been made a party to the suit. **MOHENDRO NATH MUKERJEE v. NAFUR CHUNDER PAL CHOWDHRY** ... 531

Ancestral Immovable Property. See FORECLOSURE ... 343

Appeal. See AWARD ... 455

2. — *Ex-parte Decree—Application for re-hearing refused—No Appeal—Act X of 1877, Code of Civil Procedure.]* An application under section 119, Act VIII of 1859, for the re-hearing of a case decreed *ex-parte* was rejected. Under that law this order was appealable. No appeal was, however, filed until October 1st, 1877, on which date Act X of 1877 came in force: *Held*, that the appeal is inadmissible, or there is no provision in Act X of 1877 for such an appeal. *In the matter of MUSSAMUT JAN KOER* ... 408

Appeal to Privy Council—Final Decree, Judgment or Order—Code of Civil Procedure, Act X of 1877, section 595 (a).] An order of the High Court directing execution to proceed is not a "final" decree, judgment, or order within the meaning of cl. (a), section 595 of the Code of Civil Procedure, Act X of 1877. **JOGENDRA SAHAI v. MUSSAMUT MURACHO KOER** ... 354

Appeal by Complainant. See ANCESTRAL PROPERTY ... 339

Appeal from Order—Party to the Suit—Act XXIII of 1881, section 11.] The plaintiff, who not proved, transfer of a decree decreed by merely applying for execution of the decree.

Appeal from Order—continued.

constitute the applicant a party to the suit within the meaning of section 11, Act XXIII of 1861; and, therefore, the applicant has no right of appeal from an order rejecting the application made by the Court which passed the decree. *HURO LOH DASS v. SOORJAWUT ALI*, 8 W. R., 197, discussed. *ABIDUNISSA KHATOON v. AMIRUNNISA KHATOON*, 1 L. R., 2 Cal., 327; L. R., 4 Ind. App., 66; followed. *SOOBA BEEBEE v. FUKURUNNISA BEGUM* ... 331

Application to enforce a Decree. See LIMITATION ACT (IX of 1871), Sch. II, Art. 167 ... 23

Application to set aside a sale—Rival decree-holders—Act VIII of 1859, sections 256 and 257—Act X of 1871, section 311.] Act VIII. of 1859, sections 256 and 257, do not apply to third parties. *JOGE NARAIN SINGH v. BHUGBANO*, 2 W. R., 13, *Mis.*, followed. *KRISHNARAV VENKATESH v. VASUDEV ANANT*, 11 Bom., 13, dissented from. *MUSAMUT MAINA KOBE v. LUOHMUN BHUGGUT* and others ... 250

Arbitration. See AWARD ... 455

Arrest before Judgment—Property within Jurisdiction.] The words "any portion of his property" in the latter part of sec. 483 of the New Code of Civil Procedure, Act X of 1877, mean any portion of the property of the defendant which is within the jurisdiction of the Court in which the suit is pending. *KEDAR NATH DUTT v. SEWA VEHANA RANA LUOHMUN CHETTY* ... 336

Attachment—Section 531, Code of Criminal Procedure—Possession—Attachment—Order of Magistrate.] It is only when, after recording a proceeding under sec. 530, Code of Criminal Procedure, and taking evidence, a Magistrate decides that neither party is in possession or is unable to satisfy himself as to which party is in possession, that he can, under sec. 531, attach land in dispute. He is not competent summarily to order attachment without such preliminary proceedings. *In the matter of RAM SOONDAREE DEBEE* ... 86

2. ——— Right to receive Malikana—Act VIII of 1859, secs. 235, 237, 240.] An attachment of a right to receive malikana from the Collector, if made under Act VIII of 1859, sec. 237, is not good, and will not invalidate a mortgage of the right executed while such attachment was pending. Under that section attachment can be made only of a specific amount which may be set forth in the request as then payable or likely to become payable to the debtor. *NILKANTO DEY v. HURO SOONDREY DASSEE* ... 412

Auction—purchaser. See SALE IN EXECUTION OF DECREE ... 517

Award—Arbitration—Judgment according to Award—Act VIII of 1859, secs. 325, 327—Application to have an Award filed in Court—Appeal.] Where there has been an award, and

Award—continued.

the decree passed by the Court below is in accordance with that award, that judgment is final; but where it can be shown that there was not in fact any award on which a judgment could be based, there is no final decree, and an appeal will lie. The fact that the arbitrators themselves clearly doubt the correctness of their decision is a strong objection to the finality of an award. It is one which tends to show that the award is not valid; and on this ground an appeal will lie against an order granting an application to have an award filed in Court. *SREENATH CHATTERJEE v. KOYLASH CHUNDER CHATTERJEE*, 21 W. R., 248; and *LALLA ISHUREN PERSHAD v. HUR BRUNJUN TEWANE*, 15 W. R., 9 F. B.; 8 B. L. R., 315, discussed. *BUNYAD MAHTON v. NATHOO SAHOO* ... 455

Bad Livelihood—Code of Criminal Procedure, sec. 505—Bad Livelihood—Charge—Notice of precise matter proved—Witnesses—Bail.] A person against whom proceedings for bad livelihood have been taken is entitled to have embodied in a charge the precise matter which the Magistrate considers established by evidence against him. It is not sufficient to say generally that there is suspicion. He should be asked to produce his witnesses, or offered assistance to procure their attendance. He should be admitted to bail. A Magistrate is not competent to refuse bail unless the law sanctions such refusal. *In the matter of KOOKOR SINGH*, Petitioner ... 130

2. ——— Section 505, Code of Criminal Procedure—Object of Chapter XXXVIII.] The object of Chapter XXXVIII, Code of Criminal Procedure, is the prevention not the punishment of crime. When a charge of a specific offence is under trial, proceedings under Chapter XXXVIII should not be instituted. *JUGGUT CHUNDER CRUCKERBUTTY* (1 L. R., 2 Cal., 110), followed. *In the matter of UMBICA PERSHAD*, Petitioner ... 268

Bail. See BAD LIVELIHOOD (1) ... 130

Bank of Bengal—Transfer of Share Certificate—Refusal to transfer—Act XI of 1876, secs. 17, 20, 21.] The language and the evident intention of sec. 17, Act XI of 1876, points to a present debt only as conferring upon the Bank of Bengal a right to refuse to register a transfer of a share certificate. *Stockton Iron Malleable Co.'s case*, 2 Ch. D., 101, cited and approved. In order to entitle a plaintiff to a mandatory order directing the Bank of Bengal to register a transfer, the plaintiff must show that he applied for such registration at a time and under circumstances when the Bank was enabled and bound to comply with the request. An application made during a time when, in accordance with Act XI of 1876, section 20, the transfer books are closed, has no more effect than if it had never been made. *MATHOOR MOHUN ROY v. BANK OF BENGAL* ... 507

- Bank Note.** See **STOLEN PROPERTY** ... 339
- Bastee Land.** See **HOMESTEAD LAND** ... 577
- Benamsee.** See **PARTNERSHIP** ... 545
- Bengal Legislative Council.** See **SPECIAL APPEAL** ... 39
- (Bengal) Regulation VIII.** See **REGULATIONS** [369, 236, 596]
- Bengal Rent Act.** See **SUIT. (2). SPECIAL APPEAL (2). ACT VIII (B.C.) of 1869** 39
- Breach of Trust.** See **TRUSTEE.** ... 80
- Cause of Action—Decree in previous suit—Execution, failure to take out.]** Where a party brings a suit for possession and obtains a decree which he neglects to execute, no subsequent suit on the same cause of action will lie. *GOPIMOHUN DASS v. TINCOURN GUPTA* ... 254
- Charge.** See **BAD LIVELIHOOD** ... 130
- Charter Act, sec. 15.** See **HIGH COURT.** 352
- Code of Criminal Procedure.** See **ACT X OF 1872.**
- Code of Criminal Procedure, Sections 491, 494—Evidence taken before party concerned—Sec. 530—Proceeding necessary.]** A proceeding under sec. 530, Code of Criminal Procedure, must be recorded by the Magistrate, stating the grounds of his being satisfied of the existence of a dispute regarding land, &c., likely to induce a breach of the peace, before he can order a person to be retained in possession thereof. A Magistrate cannot bind over a person to keep the peace, unless he has adjudicated on evidence taken in the presence of that person that a breach of the peace is probable. If such person fails to attend on a summons duly served, a warrant should issue (sec. 494); the order for security cannot be passed *ex parte*. *In the matter of OKHL CHUNDER BISWAS* ... 48
- Code of Civil Procedure.** See **ACT VIII OF 1859; ACT XXIII OF 1861; ACT X OF 1877.**
- Commission to examine witnesses—Return—Letter of Judge—Evidence.]** A letter from a Judge cannot be given in evidence to show that a formal return, made by him on a commission to examine witnesses, was wrong. *LAND MORTGAGE BANK OF INDIA v. SYUD MUNSUB ALI and others* ... 239
- Commitment, Order of—Sec. 296, Code of Criminal Procedure—Notice to party accused—Order directing commitment.]** Before a Court of Session can, under sec. 296, Code of Criminal Procedure, direct a Magistrate to commit the accused in a "Sessions case," which has been improperly dismissed under sec. 147, it is bound to give the accused person notice of the application for such an order, so that he may show cause why it should not be passed. *BUNDEO,*
- Commitment, Order of—continued.**
22 W. R., 67; *Nowab, 24 W. R., 70*, followed. *DWABKANATH BHUTTACHARJEA and others* ... 93
- Commitment.—Homicide—Grievous Hurt—Discretion of Magistrate—Commitment ordered—Conviction set aside.]** Where death has resulted from a violent attack, the Magistrate is bound to commit to the Court of Session, on a charge of culpable homicide not amounting to murder. Conviction of grievous hurt is contrary to law. *In the matter of GOPINATH SHAHA and another, Convicts* ... 141
- Complaint—Code of Criminal Procedure, Sec. 142—Indian Penal Code, Ch. XX, Sec. 494—Jurisdiction.]** A complaint was made to a Magistrate accusing a certain person of having taken or kept the wife of the complainant. In the course of the proceedings it appeared that the wife had committed bigamy (section 494, Indian Penal Code). The Magistrate without a further complaint committed the woman alone for trial by the Court of Session: *Held*, that the Magistrate had acted within his jurisdiction; section 142 of the Code of Criminal Procedure being designed to prevent a Magistrate from inquiring without complaint into a case connected with marriage; but, when a case is properly before the Magistrate, he may proceed against any person implicated. *In the matter of UJJALA BEWA* ... 523
- Conditional Sale.** See **FORECLOSURE** ... 369
- Confession—Section 25, Evidence Act—Confession to a Police Officer.]** Under sec. 25 of the Indian Evidence Act I of 1872, a confession made to a Police Officer is inadmissible in evidence, except so far as is provided by sec. 27. It is immaterial whether such Police Officer be the officer investigating the case—the fact that such person is a Police Officer invalidates a confession. *In the matter of HURAI MYA alias ABDOL WAHID* ... 21
- Confiscation.** See **SUMMARY TRIAL** ... 442
- Consideration, Inadequacy.** See **FRAUD** 107
- Constructive Notice.** See **EXECUTION—PURCHASER** ... 296
- Co-sharers—Agreement to receive Allowance—Mortgage of Shares.]** Where a Mahomedan widow, her two minor sons, and six relatives were entitled by inheritance to certain property originally belonging to a paternal ancestor of the sons, and the six relatives received instead of their shares a commuted allowance: *Held*, that the holder of a money-decree, on a mortgage bond in which the widow and the six relatives had jointly pledged their interest in the property for the payment of money, could, as against the sons, sell the seven shares in execution of his decree; it not appearing that the agreement to accept the commuted allowance was irrevocable, or that that agreement had not been entered into

Co-sharers—continued.

with the widow alone. **KALLY PROSAD ROY v. SYUD SARFFERAZ ALI** ... 399

2.——Apportionment of Rent—Frame of suit—Co-sharers and tenants defendants. Three out of five co-sharers, proprietors of certain mouzahas, brought a suit against the patnidars for the proportionate amount of the rent due to them, and for the determination of that amount, making the two remaining sharers defendants: *Held*, that the suit was properly framed. **SREENATH CHUNDER CHOWDHRY v. MOHESH CHUNDER BUNDOPADHYA** 453

— See ADVERSE POSSESSION. (3) ... 364

Cossyah and Jynteeah Hills. See LEGISLATIVE COUNCIL, POWERS OF ... 161

Costs. See TENDER. INTEREST ... 470, 158

— **Security for.** See EXECUTION. APPEAL ... 347

Court of Revision. See WITHDRAWAL OF ORDER ... 486

Current Account. See PARTNERSHIP. (1) 525

Dayabhaga. See STREEDHUN ... 318

Declaratory Suit—Confirmation of Title—Objection first raised in Special Appeal. Under the law in force before the Specific Relief Act (Act I of 1877) was passed, a suit by a plaintiff in possession for a mere declaration of title would not lie. Thus, where A, the occupier of land alleged to be lakheraj, was sued for rent in the Small Cause Court, and a decree was given against her: *Held*, that a subsequent suit by A for a declaration of her right to hold the land as lakheraj, would not lie. **PADAYALINGAM PILLAY v. SHANMUGHAN PILLAY** and others, 2 Mad., 333, approved. The High Court is bound, in special appeal, to consider an objection which raises the question whether a plaintiff is entitled to maintain the suit, and to obtain the decree which he asks for, even though such objection has not been taken in the memorandum. **POROMSHOOK CHUNDER v. PARBUTTY DASSEE** ... 404

Decree, Execution of. See LIMITATION ACT ... 23

— See INTEREST. (1) ... 168

— **Cause of Action—Decree in a previous Suit—Execution, failure to take out.** Where a party brings a suit for possession and obtains a decree which he neglects to execute, no subsequent suit on the same cause of action will lie. **GOPi MOHUN DOSS v. TINCOURI GUPTA** ... 254

Delegation of Powers. See LEGISLATIVE COUNCIL, POWERS OF... 161

Desertion. See DIVORCE. ... 552

Discharge, Order of—Improper discharge—Order for trial—Sec. 237, Code of Criminal Procedure—Power of High Court. In considering

Discharge, Order of—continued.

whether a person has been improperly discharged by a Magistrate, the High Court, under sec. 297, Code of Criminal Procedure, is not restricted only to an error in law, but can order a trial where *prima facie* the evidence establishes a case against the accused to which he should be required to enter on his defence. The Sessions Judge was, however, not competent himself to order the trial or inquiry to proceed; but, as the order was otherwise a proper order, the High Court in setting it aside revived it as its own order. *In the matter of TROYLOKHYNATH MITTER* and another ... 83

Dishonour, Notice of. See HUNDI ... 429

Divorce—Dissolution of Marriage—Separation—Desertion. Where the separation between husband and wife is the act of the wife, or where the wife of her own free will assents to a complete separation, there can be no desertion of the wife by the husband; nor, until husband and wife have again co-habited, can the subsequent conduct of the husband transform what was a voluntary separation into desertion by the husband. The fact that a wife has, for two years before separation, withdrawn from conjugal intercourse with her husband, while continuing to live under the same roof with him, does not disentitle the wife to charge her husband with desertion; provided such withdrawal was brought about by his misconduct, and was a matter to which he was wholly indifferent. **FITZGERALD v. FITZGERALD**, L. R., 1 P. and D., 694, discussed and distinguished. **WOOD v. WOOD** ... 552

Easement—Julkur—Limitation—Act IX of 1871, sec. 27.] A *julkur* is not an easement within the meaning of Act IX of 1871, sec. 127. Plaintiffs were proprietors of a certain lake, the right of fishing in which they let out to tenants. In this lake the defendants fished for eighteen years adversely to, but with the knowledge of, the plaintiffs: *Held*, that a suit to have it declared that plaintiffs were entitled to the *julkur*, and that the defendants had no right to fish therein without their permission, was barred by limitation. **PARBUTTY NATH ROY CHOWDHRY v. MUDHOO PAROL** ... 592

2.—— See RIGHT OF WAY ... 425

Enhanced Rent. See KABULIAT ... 241

Enhancement—Fruit trees—Act VIII (B.C.) of 1869, sec. 18] In a suit for enhancement of rent, defendant pleaded that the land was used solely for fruit trees, and that those trees were originally planted by the defendant; that consequently, any increase in the value and productiveness of the land in consequence of the growth of the trees must be attributable to the agency of the defendant, and, therefore, by sec. 18 of Act VIII (B.C.) of 1869, such increase would

Enhancement—continued.

be no ground for enhancement: *Held*, a bad defence. **OBHOY CHUNDER SIRDAR v. RADHA BULLUBH SEN** 549

2. ———— *Service of notice—Assessment.* Defendants held 29 beegahs and 83 beegahs of land, the former admittedly as tenants to the plaintiffs, the latter they claimed to hold rent-free. Plaintiffs brought a suit for arrears of rent on the 29 beegahs and the 83 beegahs pursuant to a notice of enhancement, service of which they failed to prove, and the suit was dismissed on that ground. In special appeal plaintiffs contended that the suit was for assessment and not for enhancement, and that no notice was necessary: *Held*, that having (as by the Rent Law they were entitled to do) treated the suit originally as one for enhancement, it was too late to shift ground in special appeal. Where the service of notice of enhancement relied on has not been personal, it will not be valid unless it appear that an attempt has been made to effect personal service on all the defendants. **RASH BEHARY MOOKERJEE v. KHETRO NATH ROY** 418

Estoppel by conduct—Right of Occupancy.]

If A allows B to deal with an occupancy tenure as full owner, and by an attempted transfer, to work a forfeiture thereof without any objection on his part, A will not be allowed to come in afterwards and claim a part of the forfeited holding on the ground that B was only part owner, and could, therefore, only work a forfeiture of his own share. **SHEIKH MANIBULLAH v. SHEIKH RAMZAN ALI** 293

Evidence. See **REGISTRATION** 328

————— See **CRIMINAL PROCEDURE, CODE OF** 48

————— See **COMMISSION** 239

Suit for Arrears of Rent—Ex-parte Decree—Estoppel.]

A sued B for the rent of 1278 and got an *ex-parte* decree, which he never executed, and which became barred by limitation. A afterwards sued for the rent of 1279, and tendered the then barred *ex-parte* decree as evidence of the amount due. On a question which arose as to its admissibility in evidence, and the value to be attached to it: *Held* the *ex-parte* decree, though barred by limitation was, for the purposes of evidence, as good as any other decree, unless shown to have been irregular, contrary to natural justice, or fraudulently obtained. A decree obtained *ex-parte* is, in the absence of fraud or irregularity, binding between the parties for the purposes of evidence and estoppel, as any other decree. **MAHARAJAH BIRCHUNDER MANICK v. RAM KISHAN SHAW**, 23 W. R., 128, considered and explained. If a defendant does not think it worth while to contest a suit, but allows the plaintiff's evidence, and the judgment passed upon it, to go unquestioned,

Evidence—continued.

he has no right afterwards to dispute the correctness or the value of the judgment, merely because he chose to absent himself from the trial. **NOBO DOORGA v. FYZ BUKSH CHOWDREY**, 24 W. R., 403, cited and approved. **MAHARAJAH BIRCHUNDER MANICKYA BAHADOOR v. HURRISH CHUNDER DOSS** 585

Evidence Act. See ACT I OF 1872.

————— (I of 1872), Section 25. See **CONFESSION** 21

Evidence of splitting of tenure—Rent

suit—Non-joinder of co-sharers. Where a tenant has agreed with his landlords to pay a certain rent for his whole holding, the fact that he has paid each landlord his proportionate share of the rent is not conclusive, but merely presumptive evidence that, for the original contract, there has been substituted a separate contract with each of his lessors. **ANOU MUNDUL v. SHAIKH KAMALOODDEEN** 243

Examination of Accused—Record of questions asked—Omission of Magistrate.]

The omission of a Magistrate to have recorded in the verbatim the questions asked in the examination of the accused person does not necessarily render that examination inadmissible as evidence. **TITU MYA, Appellant** 1

2. ———— Code of Criminal

Procedure, Act X of 1872, sec. 250. Under sec. 250 of the Code of Criminal Procedure, the Court may, from time to time, at any stage of the case, examine the accused personally; but the Court is not competent to subject the accused to severe cross-examination. The discretion given by the law is not to be used for the purpose of driving the accused to make statements incriminating himself; but only for the purpose of ascertaining from the accused how he is able to meet facts standing in evidence against him, so that these facts should not stand against him unexplained. *Virabudra Goud*, 1 Mad., 199, quoted and followed. *In the matter of CHINIBASH GHOSH* 436

Excess Payments under Decree. See **SUIT** 5

Execution of decree—Decree passed by another Court—Transfer to third Court for execution—Jurisdiction—Procedure—Act VIII of 1859, secs. 285, 286, 290.]

A decree obtained in the Court at X was transferred for execution to the Court at Y, where, after some time, the case was struck off the file. The decree-holder subsequently applied in Y to have the case sent for execution to the Court at Z: *Held*, that the Y Court had no jurisdiction to grant the application; that the proper course for the decree-holder to pursue was to apply under section 290, Act VIII of 1859, to the Court where the decree was obtained originally, for

Execution of decree—continued.

a fresh certificate of transfer to the third Court. **BAGRAM v. WISE**, 10 W. R., 46, distinguished. **SHIBNARAIN SHAHA v. BEPIN BEHARI BISWAS** ... 539

2. ———— *Act VIII of 1859, sec. 270—Decree of Subordinate Court—Execution.* A decree was passed by the Subordinate Judge, and in execution of that decree, a sale of certain property was held and conducted by the Nazir of the District Judge: *Held*, that, in reference to that sale, the District Judge had no jurisdiction to pass any order under the provisions of sec. 270, or any order respecting the re-sale of the property. **NOBO KISHORE DASS v. PROTAP CHUNDER BANERJEA** ... 534

3. ———— *Rent Decree for less than 500 rupees—Act VIII (B.C.) of 1869, sec. 58—Limitation—Application for Execution—Fresh Application.* The true construction of Act VIII (B.C.) of 1869, sec. 58, is that execution shall not issue unless a proper application for execution is made within three years from the date of the judgment. **RERDHOY KRISHNA GHOSE v. KOYLASH CHUNDER BOSE**, 13 W. R. (F. B.) 8, cited and followed. **LALLA RAM SAHOO v. DODRAJ MAHTON**, 20 W. R., 395, dissented from. Circular Order of the 10th of July 1874, discussed. **SREEMUTTY GOLUCK MONY DEBIA v. MOHAMED CHUNDER MOHA** ... 149

4. ———— See **HINDOO LAW** 49

Execution, Failure to take out. See **CAUSE OF ACTION** ... 254

——— *Limitation Act, IX of 1871, Sch. II, Art. 167.* Application for execution of a decree must be made within three years of a previous application as required by Act IX of 1871, Sch. II, Art. 167. **UMRASHANKAR LAKMIRAM v. CHHOTALAL VAGERAM**, 1 L. R., 1 Bom., 19, held not to apply. **GIBI DHAREN SINGH** and another *v.* **RAM KISHORE NARAIN SINGH** and others ... 252

——— *Limitation Act IX of 1871, Sch. II, Art. 167.* Act IX of 1871, Sch. II, Art. 167, allows three years from the date of a previous application for execution, whether that previous application has been *bona fide* or merely colourable, provided it was made whilst the decree was in force. A Judge is not, therefore, competent to go into the question whether a previous application is colourable or not; but he is competent to decide whether or not any decree was alive at the time such previous application was made. **KSHAN CHUNDER BOSE v. PRANNATH ROY**, 22 W. R., 512; 14 B. L. R., 143; **ROHITREE NUND'N MITTER v. BHUGWAN CHUNDER ROY**, 22 W. R., 154, explained. **BEKUL DASS v. IKBAL NARAIN**, 25 W. R., 249; and **BISSESUR MULLICK v. MAHATAB CHUNDER**, 10

Execution—continued.

W. R., 9, F. B., cited. **ANNODA PROSHAD RAI v. SHEIKH KURBAN ALI** ... 408

——— **Struck off in Default.** See **LIMITATION** ... 475

——— **Application for—Heirs of Judgment-debtor—Act VIII of 1859, secs. 203, 210, 211.** Where an application is made and granted under sec. 210, Act VIII of 1859, and property is attached which is claimed by the heir as his self-acquired property, the Court should proceed under sec. 203, without requiring any fresh application to be made under that section. **RAM CHUND CHUCKERBUTTY v. MADHUB NABAIN ROY** ... 359

——— **Application for stay of—Act VIII of 1859, sec. 338.** Application for stay of execution of a decree, an appeal from which has been filed, should, under Act VIII of 1859, sec. 338, be made to the Court of Appeal, and not to the Court which passed the decree under appeal. **ABBASER BEGUM v. MAHARANEE RAJ ROOP KOOR** ... 368

——— **Appeal—Security for Costs—Act VIII of 1859, secs. 204, 342.** Where security is demanded and taken, under Act VIII of 1859, sec. 342, before decree, for the purpose of securing to the respondent his costs, in the event of his being successful, the security may, under Act VIII of 1859, sec. 204, be enforced against the surety or his representatives, in execution of the decree dismissing the appeal. Procedure to be followed in such cases stated. **RAM KISHORE DASS v. HUKHOO SINGH**, 7 W. R., 329, and **GUJENDRO NATH ROY v. HEMANGINER DASER**, 13 W. R., 35; 4 B. L. R., 27, App., cited and distinguished. **CHATTERDHARY LALL v. RAM BELASHEE KOOR** ... 347

Execution Purchaser—Constructive notice—Contribution. *Per KENNEDY, J.*—An execution purchaser takes subject to all equities affecting the judgment-debtor, and will be bound by constructive notice in the same way as an ordinary purchaser. **KINDERLY v. JERVIS**, 22 Beavan, 1, and **BREWER v. LORD OXFORD**, 6 De G. M. & G., 507, cited and followed. If a decree declares a lien over A's property, for a certain sum in favour of B, and subsequently A sells part of this property to B, and part to C, B cannot sue to enforce his lien against C's purchase without bringing his own into contribution. **RAM LOOHUN SINGH v. RAMNARAIN** ... 296

Ex-parte Decree. See **APPEAL** ... 402

2. ———— See **EVIDENCE** ... 585

Foreclosure—Conditional Sale—Service of Notice—Regulation XVII of 1806. In proceedings under Regulation XVII of 1806, sec. 8, the functions of the Judge are purely ministerial and not judicial. It is his duty to take certain proceed-

Foreclosure—continued.

ings as therein laid down, and make a record of them; but he can give no judgment in any way binding on the parties, whose rights are regulated entirely by the Regulation itself. *FORBES v. AMBEROONISSA BEGUM*, 10 Moore's Ind. App., 340; 3 W. R., 47, P. C., cited and approved. The condition of foreclosure required by Regulation XVII of 1806, sec. 8, is that the mortgagor should be furnished with a copy of the petition, and should have a notification from the Judge, in order that he may, within a year from the time of such notice, redeem the property. In an action brought to recover possession as upon a foreclosure, it is essential for the plaintiff to satisfy the Court, by evidence, that the foregoing condition has been complied with. *SYUD YUSUF ALI KHAN v. MUSSAMUT AZUMTOOISSA*, W. R., 1864, p. 49; and *MADHO SINGH v. MAHTAB SINGH*, 3 Alla., 325, cited and approved. It is doubtful whether the finding of the Judge, recorded by him in the proceedings upon the foreclosure petition, would be even *prima facie* evidence of the fact of service of notice. Proof of service of notice on the parties entitled may be waived by an admission by them that the notice was properly served upon them at the time at which the mortgagee alleges it to have been, or that they had knowledge of it at a time which would have justified the foreclosure. When the mortgagee seeks to foreclose he must discover and serve notice of foreclosure on the persons who are the then owners of the estate whether in possession or not. The purchaser of the equity of redemption, though not in possession, is therefore entitled to receive notice. *MOHUN LALL SOOKUL v. GOLUCK CHUNDER DUTT*, 10 Moore's Ind. App., 1; 1 W. R., 19, P. C., quoted. Where property, though held in certain shares, is mortgaged as a whole, the mortgagee cannot obtain a foreclosure of the whole of the estate, or of any part of it, upon a service on some only of the mortgagors. The year during which the mortgagor may redeem his property runs not from the date of the perwannah or the issuing of it by the Judge, but from the time of service. *MOHESH CHUNDER SEN v. MUSSAMUT TABINER*, 10 W. R., 27, F. B.; 1 B. L. R., 14, F. B., cited and approved. *NORENDUR NARAIN SINGH v. DAWKA LAL MUNDUR* ... 369

2. ——— *Mitakshara Law—Ancestral Immoveable Property—Alienation.*] Discussion of what constitutes ancestral immoveable property under the Mitakshara law. Up to the time of the foreclosure becoming absolute, the interest of the vendee by conditional sale amounts only to securing his money. He has the land, but he has it simply as security. The effect of the foreclosure is (it is believed) to put an end to the conditional sale and make the property the immoveable property of the person who advanced the money from the date of the conditional sale. *GIRDHARE LALL v. KANTOO LALL*, 22

Foreclosure—continued.

W. R., 56, stated. *SHAM NARAIN SINGH v. RUGHUBUR DYAL* ... 343

Forfeiture. See RECOGNIZANCES... 134

Fraud—Misrepresentation—Concealment.] A transaction will not be set aside merely on the ground of inadequacy of consideration, unless the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition. *TENNENT v. TENNENT*. Law Rep., 2 Scotch Appeals, 6, cited and followed. *ADMINISTRATOR GENERAL OF BENGAL v. JUGESSUR ROY and others* ... 107

Good Behaviour, Security for—Sec. 509, Code of Criminal Procedure—Mode of fixing the amount.] The amount of the security to be furnished for good behaviour should be such as to afford the person a fair chance of complying with the order, so as not to make the alternative imprisonment unavoidable. Such imprisonment is not as a punishment for a crime committed, but as a protection to society against the perpetration of a crime by the individual on his failing to furnish other security. When the amount of security required is *prima facie* unreasonable, the High Court can call upon the Magistrate to certify the grounds for fixing that amount, 4 Mad. xlv, App., approved and followed. *In the matter of DEDAR BAKSH and HALAL CHOR*... 95

High Court. See DISCHARGE, ORDER OF. LOCAL NUISANCE. ... 83, 58

——— **Jurisdiction of.** See LEGISLATIVE COUNCIL, Powers of ... 161

——— See VERDICT OF JURY. ... 275

2. ——— *Charter Act, sec. 15—Extraordinary powers—Right of Appeal in ordinary cases.*] When there is the right of appeal provided by law, the High Court will not exercise its extraordinary powers under sec. 15 of the Charter Act. All other remedies provided by law must be first exhausted. *RAJCOOMAR SINGH v. DINO NATH GHUTTUCK* ... 353

Hindoo Law. See MITAKSHARA ... 97

2. ——— *Mitakshara—Joint Hindoo family—Execution of decree—Sale of share of one member—Purchaser can compel partition.*] Even if a member of a joint undivided Hindoo family living under Mitakshara law cannot encumber his share in the joint property without the consent of his co-sharers, where he has contracted a lawful debt, the creditor can enforce his decree by selling the right and interest of the debtor; but though the purchaser acquires a lien on the property to that extent, he can only compel the partition which the debtor might have compelled, had he been so minded, before the alienation of his share took place. Full Bench judgment of the Calcutta High Court, 12 W. R.

Hindoo Law—continued.

1, F. B., 3 B. L. R., 31, F. B., SUDABURT PER-
SAD SINGH v. PHOOLBASH KONE, explained.
The rule in Bengal is thus made similar to that
in Madras and Bombay. DEEN DYAL LALL v.
JAGDEEP NARAIN SINGH ... 49

Hindoo Widow. See MITAKSHARA ... 97

**Homestead Land—Landlord and Tenant—
Express and Implied Contracts—Custom—Con-
duct of parties.]** The nature of a homestead
holding must, as between landlord and tenant, be
always matter of contract, express or implied.
If there is no express agreement the law implies
one determinable at the option of either party;
that is, implies that the tenant holds at will, or
from year to year, or, in other words, by the
landlord's permission upon what may be the
usual terms of such holding by the general law
or by local custom; and in such a case the tenant
is liable to be ejected on a reasonable notice to
quit. The contract which the law implies may
be varied by local custom, or by conduct of the
parties showing an intention that the tenure is
not to be taken as permissive; but these are
matters which must in each case be proved, and
proved clearly. ADDAYTO CHURN DEY v. PETUM-
BER DOSH, 17 W. R., 383. KOYLASH CHUNDER
SIRCAR v. WOOMANUND ROY, 24 W. R., 412.
RAMDHUN KHAN v. HARADHUN PORAMANICK,
9 B. L. R., 107; cited and approved. PROSONNO
COOMARIE DEBEE v. SHEIKH RUTTON BE-
FARY ... 577

Hundi—Notice of Dishonour—Onus.] In a
suit against the indorser of a *hundi*, absence of
formal written notice of dishonour is not a suffi-
cient defence, unless it is also shown that by
absence of such notice the defendant has been
prejudiced. Where, in a suit by the indorsee of
a *hundi* against his immediate indorser, the
defendant pleads want of consideration, the *onus*
is on him to prove his plea. GOVIND RAM
MARWARI v. MONTORA SAHLO ... 429

Injunction. See PATENT ... 66

**Insolvent Act—11 and 12 Victoria, Chap. 21,
sec. 28—Summary Procedure.]** The procedure
under sec. 26 of the Insolvent Act is not cal-
culated to effect satisfactorily the trial of diffi-
cult questions of title, and the Court will, in
accordance with its usual practice, abstain from
deciding such questions in proceedings under that
section, and refer the parties to a regular suit. *In re*
DWABKANATH MITTER, 4 B. L. R., 63, ap-
proved. *In the matter of UMBICA NUNDUN*
BISWAS ... 561

Interest. It may be taken, as established, that
the Court will not allow interest on costs in cases
where the decree is silent about it. AMERROONISSA
KHATOON v. MEEB MAHOMED CHOWDEY, 18
W. R., 108. ULFUTUNNISSA v. MOHAN LALL
SUKAL, 6 B. L. R., 33 App.; and MOSOODUN

Interest—continued.

LALL v. BHEEKAREN SINGH, 6 W. R., 169, Mis.,
cited and followed. MAHARAJAH OF BIRDWAN
v. RAM LALL MOOKERJEE ... 158

2. ——— **Rate of.—Suit for Rent—Current
Rate of Interest—Act VIII (B.C.) of 1869, sec.
21.]** Where a pottah stipulates that, in case of
default of punctual payment of rent, all arrears
shall bear the customary and legal interest, 12
per cent. per annum will be allowed in analogy
to Act VIII (B.C.) of 1869, sec. 21. ANUGEO
MOHUN DEB ROY v. MUDDUN MOHUN MOZOOM-
DAR and others ... 147

3. ——— **Failure of Consideration—Sale of
Patni Tenure—Regulation VIII of 1819—Inter-
est.]** Where a sum of money becomes due and
payable at a specified time, the Court may award
interest, in the shape of damages, for such period
thereafter as the money remains unpaid. TARA
CHAND BISWAS and others v. NAFAR ALI BIS-
WAS ... 236

Intermediate Holding. See TRANSFERABLE
TENURE ... 397

**Issues, Framing New—Changing the nature
of suit.]** A sued to eject a ryot on the ground
of his holding over after the term of his pottah
had expired. The ryot denied that he had ever
held under a pottah from A, and alleged that
the jote belonged to B. Plaintiff's allegations were
found to be false, and his suit was dismissed.
The lower Appellate Court directed B to be
made a defendant, and remanded the suit to
have the question of ownership tried between
A and B; at the same time agreeing with
the Court of First Instance that the allegations
in the plaint were false: *Held* that the lower
Appellate Court should have dismissed the case,
and was wrong in so remanding it. *Per* CUN-
NINGHAM, J. —The right of framing new issues
arises where the issues framed are insufficient
to dispose of the matters raised in the plaint.
RAM DHUN KHAN v. HARADHUN PURAMANICK,
12 W. R., 404, cited and distinguished. BHOO-
BUN DASS MUNDUL v. SREEMUTTY BILASHMONY
DASSHE ... 415

**Joinder of Charges—Code of Criminal Pro-
cedure, sec. 453—Several offences committed.]**
Sec. 453 of the Code of Criminal Procedure
is not to be construed as meaning that, no matter
how many offences of the same kind a man
may commit within one year, he may not be
prosecuted for more than three. He may be
separately tried for other offences. *In the*
matter of RAM MANIKYA CHUCKRABORTY ... 478

**Joint Contract—Suit against one of several
joint Contractors—Usages—Contract Act, IX
of 1872, sec. 43.]** A judgment obtained against
one or more of several joint contractors operates
as a bar to a new suit against any of the others.
The fact that the joint contractors are trading

Joint Contract—continued.

partners does not affect the rule. The effect of sec. 43 of the Indian Contract Act is to allow the promisee to sue one or more of several joint promisors in one suit, and to prohibit a defendant in such a suit from objecting that his co-contractors ought to have been sued with him. **KING v. HOWE**, 13 M. and W. 494; **BRINSMEAD v. HARRISON**, L. R. 6 C. P., 584; 7 C. P., 547; **NUTTOO LALL v. SHUNKUR LALL**, 10 B. L. R., 200, cited and approved. **ROOP LALL MULLICK v. RAJENDRONARAIN MOON-SHEN** ... 488

Joint Family—Mitakshara—Dissenting co-sharers. Where a sum of money is due to a joint Mitakshara family, one of whom refuses to join in suing the debtor, the proper procedure for the other co-sharers is to sue the debtor for the whole amount, making the dissenting co-sharer a defendant. **GURU PRASHAD ROY v. RAS MOHUN MUKHOPADHYA** ... 481

Judgment-Debtor, Heirs of. See EXECUTION ... 359

Julkur. See EASEMENT ... 592

Jurisdiction of High Court. See LEGISLATIVE COUNCIL. POWERS OF ... 161

Jurisdiction. See LAKHIRAJ LANDS ... 596

Jury. See VERDICT OF JURY ... 275

Kabuliat—Enhanced Rent—Tender of Pottah. Where plaintiff sues for a kabuliat, and the Court thinks that he is not entitled to a kabuliat at the rate claimed, but at a lower rate, no presumption can be made in favour of his having been willing to grant a pottah at that lower rate. He is, therefore, not entitled to a decree for a kabuliat at that lower rate, and his suit should be dismissed. **GHOLAM MOHAMED v. ASMUT ALI CHOWDHRY**, 10 W. R., 14 (F. B.), followed. **GOPEENATH JANAH v. JETEO MOLLAH**, 18 W. R., 272, dissented from. **GAGAN MANJHI and others v. GOVIND CHUNDER KHAN and others** ... 241

2. ——— **Counterpart—Indian Evidence Act.** I of 1872, sec. 63—**Secondary Evidence.** A let lands to B, who sub-let to C, a ryot. C sued for possession of part, after an alleged dispossession, making A a party defendant to the suit. At the hearing, C, in order to prove that the lands in dispute were part of those let to him by B, tendered in evidence the kabuliat given by him to B: *Held*, that C should have produced the pottah given him by B, and the grant from A to B, or sufficiently account for their absence; and that, as he did not do either, the kabuliat (which was merely secondary evidence of C's pottah) was inadmissible, even though it was produced from the possession of the landlord A. **SURJO NARAIN GHOSH v. HURRI NARAIN MOLLO**... 547

Lakhiraj Lands—Jurisdiction—Presumption—Resumption and Assessment—Indian Evidence Act, secs. 101, 103, 107, Regulation XIX of 1793, sec. 9.] In 1862 plaintiff got a decree in a resumption suit against defendant's predecessor, declaring his right to assess certain lands. In 1874 he brought a suit for assessment of the same lands, and, the question of jurisdiction having been raised, one of the issues framed was—"whether the resumed lakhiraj was of date anterior to the permanent settlement." *Held*, that it did not lie on the plaintiff to show that the Civil Court had jurisdiction to entertain the suit, by proving that the grant had been made since the permanent settlement; but that it lay on the defendant to show that it had not, because (1) the affirmative of the issue was asserted by the defendant; and because (2) the terms of the lakhiraj grant under which the defendant claimed would be more within his knowledge than within that of the plaintiff. In such cases, if any presumption were to be made as regards jurisdiction, it would be in favour of the ordinary and general tribunals of the country to the exclusion of any special jurisdiction to be exercised under a particular statute by the Collector. **HIRA LALL PARAMANIK v. BARIKUNNISA BEBEE** ... 596

2. ——— See RENT OF LAKHIRAJ LANDS [366]

Landlord and Tenant. See HOMESTEAD LAND. PAYMENT OF RENT TO ONE CO-SHAREE [577, 537, 564]

2. ——— **Indian Evidence Act, sec. 116—Consent Decree for Arrears of Rent.—Onus.** Plaintiff alleged a purchase of land from A and B, that he afterwards granted them a pottah and retained them in possession, and he put in evidence a consent decree obtained against B for arrears of rent: *Held*, in a suit brought to recover possession on the ground of the tenancy having expired, that that decree worked no estoppel against B by virtue of sec. 116 of the Evidence Act, and did not relieve the plaintiff from the necessity of proving his case completely. **SOLDAR MUNDUL v. NILCOMAL CHATTERJEA** ... 528

Legislative Council, Powers of—Absolute and Limited—Delegation—Act XXII of 1869.] *Held, per CURIAM*:—The High Court is competent and bound to determine whether the Legislature, in passing an Act, has acted within its legitimate powers. The Governor-General in Council could, in the exercise of his legislative powers, have removed the district of the Coazrah and Jynteah Hills from the jurisdiction of the High Court. *Per JACKSON, AINSLIE, MARKEY, and KEMP, J.J.* (GARTH, C.J., MACPHERSON and PONTIFEX, J.J., dissenting):—The notification of the Lieutenant-Governor issued under authority of Act XXII of 1869, section 9, could not have the

Legislative Council, Powers of—continued.

effect of putting an end to the jurisdiction of the High Court in the Cossyah and Jynteah Hills; that jurisdiction is now the same as it was before the notification was issued by the Lieutenant-Governor. *Per* GARTH, C.J., MACPHERSON and PONTIFEX, J.J. *contra*:—Act XXII of 1869 was a law which the Legislature were justified in passing, and which did, in conjunction with the notification which was made under it, effectually remove the district of the Cossyah and Jynteah Hills from the jurisdiction of the High Court. *Per* GARTH, C.J.:—The view which the Judges took of the powers of the Indian Legislature in the case of *BIDDLE v. TARBINY CHUN BANERJEE* (Taylor & Bell, 391, 477) has been since virtually disregarded by the Legislature itself, and overruled by the Imperial Parliament by the construction which they have put upon the Act of 1833. *THE QUEEN v. MEARES*, 22 W. R., 54; 14 B. L. R., 106; and in the matter of *FEDA HOSSEIN. I. L. R., 1, Cal., 431*, referred to. *BURA HANGSEH and BOOK SINGH v. THE QUEEN* 161

Lien—Mortgage Bond—Sale under money-decree

—*Lien—Act VIII of 1859, sec. 12—Property in different Districts* [A mere money-decree upon a mortgage bond gives the judgment-creditor the power of selling the mortgaged property with the lien, in the same way as a decree with express power to sell the mortgaged property. A person who advances money to another for the purpose of saving a mehal of the latter from sale for arrears of rent has no lien on the property for the money advanced. *Baboo DUTT JHA v. PEARNE KAUNT*, 18 W. R., 404; and *SYUD ENAYET HOSSEIN v. MUDDUN MOOREE SAHOO*, 22 W. R., 411, cited and held not to apply. *HURRI MOHUN BAGCHI* and another *v. GHISH CHUNDER BUNDOPADHYA* and another ... 152

Limitation Act, (IX of 1871), Sch. II, Art. 167—Application to enforce a decree. [The application to enforce or keep in force a decree referred to in the Limitation Act (IX) of 1871, Sch. II, Art. 167, Cl. IV., is an application made under sec. 212, Act VIII of 1859. *CHUNDER COOMAR ROY v. BHOOGUTTY PROBUNNO ROY* 23

Mesne Profits—Execution Case struck off for Default. [Where a party obtains a decree for possession and mesne profits, under which he obtains possession, but fails to prosecute his suit for mesne profits, and the execution case is struck off for default: *Held*, that it is very doubtful if, in any case, the effect of such an order would be to prevent the decree-holder again applying for execution of that portion of the decree relating to mesne profits, so long as he keeps within the provisions of the Limitation Act. It is otherwise under sec. 230, Act X of 1877. *SURDHARE LALL v. GIRINDUR CHUNDER GHOSH* 475

Limitation. See **EXECUTION OF DECREE** 149

Limitation.—continued.

See **EXECUTION** ... 252, 408
See **PARTNERSHIP** 525
See **FAILURE TO TAKE OUT**... 408

Local Enquiry without notice—Proceedings by Sessions Judge after opinion of Assessors.]

If a Sessions Judge should think it necessary to visit the place of the alleged occurrence of an offence under trial, he should give notice to the parties and the Assessors. He should not go without such notice, and after the trial has been completed by delivery of the opinion of the Assessors. *ODDH BEHARI NARAIN SINGH*, Petitioner 143

Local Nuisance—Secs. 518, 520. Code of Criminal Procedure—Court of Revision—Judicial Proceedings.]

The existence of the circumstances mentioned in Explanation I is a condition precedent to the action of a Magistrate under sec. 518, Code of Criminal Procedure. If the matter is one which cannot properly be dealt with under sec. 518, it does not fall within that section, and being a judicial proceeding is not protected by sec. 520 from the action of a Court of Revision under sec. 297. *In the matter of KRISHNA MOHUN BYSACK*, Petitioner ... 58

Malikana, Right to receive. See **ATTACHMENT. (2)** 412

Manager, Appointment of—Mortgage bond—Decree—Act VIII of 1859, sec. 243.] Act VIII of 1859, sec. 243, does not apply to a mortgage decree. *OMDA KHANUM v. MAHARAJEE RAJ ROOP KOER* 295

Mesne Profits—Accrual of right—Interest—Act XXXII of 1839—Practice of Sudder Court—Two Concurrent Findings of Fact—Appeal.]

Where the parties by a compromise admitted by the Court agreed to their respective rights in certain shares of land, and to relinquish and assume possession thereof, the right to mesne profits arises from the refusal to act in accordance with these terms, and not from the date of a subsequent decree affirming the previous order. The concurrent findings of two Courts that certain *hustabood* papers are unreliable evidence is a decision on a question of fact by the Courts which will not be disturbed by the Privy Council on appeal. The construction of the late Sudder Court that—"interest on mesne profits may be awarded as of course from the date of suit in a decree when, however, interest is awarded from an earlier or from a later date than of suit special reasons should be assigned in a decree followed"—as indicating the then existing practice in the Courts—Act XXXII of 1839, discussed. *HURRI PERSHAD ROY (HOWDERY v. SHAMA PERSHAD ROY (HOWDERY)* 499

See **LIMITATION. (2)** ... 476
Mitakshara. See **HINDOO LAW** 49

Mitakshara—continued.

Junior Widow—Partition—Maintenance.] Under the Mitakshara law the sound rule of inheritance is that two or more lawfully married wives (patnis) take a joint estate for life in their husband's property, with rights of survivorship and equal beneficial enjoyments. Widows so taking a joint interest in the inheritance of their husbands have no right to enforce an absolute partition of the joint estate between themselves. Nevertheless, there may be no objection to an arrangement for separate possession and enjoyment, leaving the title to each share unaffected; especially, where the nature or situation of the property, or the conduct of the parties, makes such an arrangement eminently desirable. **CHELLUMMAL v. MUNUMMAL** (the *Salem case*), *Strange's Hindu Law*, Vol. II, p. 90; and **JIOYIAMBIA BAYI SAIBA v. KAMAKSHI BAYI SAIBA** (the *Tanjore case*), 3 Mad., 424, cited and approved. **BHUGWANDEN DOOREY v. MYNA BANE**, 11 Moore, 487; 9 W. R., 23, P. C., discussed. **SRI GAJAPATHI NILAMANI PATTI MAHA DEVI GARU v. SRI GAJAPATHI RADHAMANI PATTI MAHA DEVI GARU** 97

— See **JOINT FAMILY** ... 431

— See **STREEDRUM** ... 318

Mitakshara Law. See FORECLOSURE 348, 369

Money-Decree. See MORTGAGE ... 446

Mortgage—Mortgage bond—No mention of specific property—Vagueness.] A simple covenant not to alienate the obligor's property until payment of a debt and interest does not constitute a mortgage. **GUNNU SINGH v. LUTAFUT HOSSEIN** 91

2. ——— Mortgagee's Lien—Money-Decree.] A mortgagee who elects to take a money-decree, and becomes himself the purchaser of the property mortgaged at a sale in execution of that decree, cannot bring a suit to enforce his lien against a person who purchased the right, title, and interest of the same debtor in the same property, at a prior sale in execution of a prior money-decree. **SREENUTTY DASSI MONI DASSI v. CHOWDEY JONMAJOY MULLICK** ... 446

— See **USEFUL FRUCTUARY MORTGAGE 256**

— See **FORECLOSURE** ... 369

Nijote. See RIGHT OF OCCUPANCY. (2) ... 394

Notice. See COMMITMENT, ORDER OF ... 93

Notice to quit—Special Appeal.] Where a tenant denies his landlord's title, and persists throughout in a vexatious and aggressive course of conduct towards him, he will not, in a suit for ejectment, be allowed in special appeal to assert that he has not been served with a notice to quit; that objection not having been taken

Notice to quit—continued.

in the Courts below. **RAMNUPFER BHATTACHARJEA v. DHOL GOBIND THAKOOR** ... 421

Notice of title—Constructive Notice—Onus.] A and B were co-sharers. B leased his share to D, taking rent separately from him; and A sold his share to C, so that B and C became co-sharers. Afterwards B conveyed his share to E and delivered D's kabuliat to him, the conveyance, which was registered, reciting payment of the consideration. Subsequently E sold the share to C for valuable consideration. In a suit brought by C for possession, B alleged that his conveyance to E was a *benami* transaction, of which C was cognizant: *Held*, that the onus of showing that was on B; and that, *prima facie*, C was justified in supposing that E had a good title to convey. **SATYA MONI DASSI v. BHUGGOBUTTY CHURN CHATTOPADHYA** 466

Obstruction to possession. See SALE IN EXECUTION OF DECREE. (1) ... 517

Partition. See HINDOO LAW ... 49

Partnership—Partnership Debts and separate Debts—Current Account—Limitation.] Plaintiff had an account with a banking firm of which the defendant was a member. On the dissolution of this firm, plaintiff made up his accounts, debiting the defendant with a share of the amount due to him from the firm, and afterwards he carried on business with the plaintiff separately. It did not appear that any settlement had been made between the parties from the time of the dissolution of the firm down to the filing of the plaint, or that the defendant had assented to a portion of the firm's debt being carried to his separate account: *Held*, that the plaintiff could not recover this sum with interest, as an item of a mutual, open, and current account, where there had been cross-demands between the parties. (See Limitation Act, XV of 1877, Sch. II, cl. 85.) **ROY DHUMPUT SINGH BAHADUR v. BABOO LEKRAJ BOY** 525

2. ——— Benames partner lending money to the concern—Creditor's Suit.] A was a partner in an indigo concern in the name of his son. In his own name A lent moneys to the concern for the purpose of carrying on the business, and each partner was to be separately liable for the moneys advanced in proportion to his share in the concern. In a suit against one of the partners for his proportion of the moneys so lent: *Held*, that plaintiff could not sue for those moneys on the footing of a mere creditor, and that the suit should be so framed as to determine the profits or losses of the concern, and whether any and what assets would be available to each partner to liquidate the loan in proportion to his share. **CHUNDER SIKHUR BISWAS v. RAM BUKAR CHETLUNGER** 545

Patent—Suit for Injunction—Patent Combi-

Patent—continued.

nation—Machine—Improvements—Act XV of 1859, secs. 24 and 25.] The fact that a machine has been several times improved since the original patent was obtained is no argument against its being a useful invention within sec. 25, Act XV of 1859. **CANNINGTON v. NUTTAL**, Law Rep., 5 H. L., 205, followed as to the test of "novelty" in an invention. In deciding whether a machine, patented as an entire invention, is an imitation and piracy of another machine previously patented as an entire invention, the question is—Is the later patented machine substantially the same as the earlier one? The fact of considerable differences existing in the several parts of the two machines will not prevent the later machine from being as a whole a copy of the earlier one, even where an exclusive privilege might have been acquired had the alterations in the later machine been claimed as improvements on the earlier one. **CLARK v. ADIE**, 2 App Cas, 815, followed. Where a patent has been obtained for a machine which the patentee subsequently somewhat improves, a subsequent specification claiming the improved machine as a novel combination is bad, though the improvement might be claimed and protected as such. Where a new arrangement of the parts of a machine is claimed as an improvement, the arrangement must be clearly described in the specification. The mere substitution of one mechanical equivalent for another already in use will not be protected. Where a case of infringement of a patent has been made out, an injunction will follow as a matter of course. A plaintiff cannot pray for an account of profits and for damages. He must elect between the two remedies. If the plaintiff elects to take an account of the profits, such accounts will only be carried back to the period of one year before the filing of the plaint, in accordance with Act IX of 1871, Sch. II, Cl. 11 (See Limitation Act, 1877, Sch. II, Cl. 40). **KINMOND v. JACKSON**, **KINMOND v. LAWRIE** and another ... 66

Patni Sale. See REGULATION VIII, 1819, 236

Patni Talook—Arrears of Rent—Amaldastak—Regulation VIII of 1819, secs. 7, 15.] If, by reason of the patnidar's not giving security, the zemindar withholds his *amaldastak*, and also abstains from availing himself of the power which the law gives him of collecting the rents himself, it would be inequitable to allow him to recover from the patnidar the rent which the withholding of the *amaldastak* has prevented him collecting. **SERRETTY BIDHOOMOOKHI DEBI v. RAJA NILMONY SINGH DEO** ... 464

Payment of rent to one co-sharer—Separation of interest—Rent Suit—Non-joinder of co-sharers—Evidence] It has often been decided that, from the fact of rent having been collected for some time by one of several co-sharers separately, an agreement for payment of the

Payment of rent to one co-sharer—contd.

separate rent of a share could be presumed; *Held*, (on appeal from **AINSLIE, J.**) that the facts of the case were not sufficient to warrant the making of such a presumption. **SHAIKH KAMAL-ODDEEN v. ANOO MUNDUL** ... 248, 564

2. ——— Possession—Share of undivided tenure—Separate Receipts.] The co-sharers in a certain jote, who were ryots having a right of occupancy, paid their rents separately to the patnidars, who gave each party a separate receipt for his "share of the undivided tenure." One of the ryots, who alleged that he had been dispossessed, brought a suit to recover possession of his separate share of the jote against the other co-sharers and the patnidars, and put the receipts in evidence to show that the patnidars had consented to the jote being divided and held in separate shares: *Held*, that they were insufficient to do so; and that the suit could not be maintained in its present form. **MUSSAMUT BEEBER GOLABJAN v. SHAIKH MASHIATOLAH** ... 537

Penal Code. See ACT XLV OF 1860 ...

Plaint, Amendment of. See REMAND ... 481

——— Presentation of—Rules for the Conduct of Business—Limitation.] The rules of the Court prescribing certain hours for the receipt of petitions and hearing of motions, cannot operate to alter the period of limitation prescribed by law, so as to exclude urgent applications made at any time in the day. *In the matter of DHPATTY SINGH, MINOR, v. DOOLAR ROY* ... 291

Police Officer. See CONFESSION ... 21

Possession. See ATTACHMENT ... 86

2. ——— Sec. 530, Code of Criminal Procedure—Order of Magistrate—Limited possession.] A Magistrate cannot, under sec. 530, Code of Criminal Procedure, order that a person be kept in possession until he has reaped the crop standing on the ground, and then that he shall give way to another. When there have been long pending disputes in the Courts he should determine who was in peaceable possession when they commenced. *In the matter of BUNWARI LALL MISSEER and others, Petitioners* ... 136

Pottah, Tender of. See KABULIAT ... 241

2. ——— Practice—Evidence—Act VIII (B.C.) of 1869, secs. 3, 4.] In a suit for enhancement of a jote, which defendant had held for more than twenty years at a fixed rent, plaintiff put in evidence a pottah dated in 1795, to show that the rent of the jote had been settled subsequently to the time of the Permanent Settlement: *Held*, that the proper way of dealing with such an instrument was to try (1) whether it was genuine; (2) whether it referred to the jote in dispute; and (3) whether the rent was fixed

Pottah—continued.

by it on the date which it bore. BABOONJAN CHOWDHRY v. JASODHUR MISSEK ... 392

Prayer for Relief. It may very well be that a plaintiff, being doubtful as to the precise form of relief to which the facts proved may entitle him, may ask the Court to give him such relief as under the circumstances the Court may think fit to give. GUNGARAM DUTT v. CHOWDHRY JUNMAJOY MULLICK ... 144

Presumption. See PAYMENT OF RENT TO ONE CO-SHAREE ... 564

2. ——— See LAKHIRAJ LANDS ... 596

Private Defence, Right of—How to be pleaded—*Sec. 105, Indian Evidence Act.* It is for those who raise the plea of private defence to prove it. The act charged cannot be denied, and the plea of private defence raised as an alternative. If raised, a full account of the occurrence must be given in evidence. JAM-SHEER SINDAR and others ... 62

2. ——— See RIOTING, 521

Probate, Grant of—Execution of Will, admission of.] The fact that a contested will bears an endorsement stating that it was acknowledged by the testator before the Registrar, does not warrant a Judge in granting probate without any other evidence in support of the will, even though the caveator does not produce any evidence to impeach the will. OBHOY CHURN MUSTAFI v. UMA CHURN MUSTAFI ... 362

Recognizances—Forfeiture.] When a Magistrate has before him the fact that a person convicted by him of an offence attended with violence was under recognizance to keep the peace, and does not, nevertheless, proceed to forfeit such recognizance, it must be held that he thought it unnecessary to do so. Proceedings taken after the lapse of a considerable period are bad, and contrary to the intention of the law. *In the matter of RAM CHUNDER LALLA, Petitioner* ... 184

Re-formation on old site—Accretion—Adverse possession.] It was decided in LOPEZ'S CASE (18 Moore's Ind. App., 467; 14 W. R., 11, P. C.; 5 B. L. R., 521) that where property is wholly submerged by a river, any land forming afterwards on the site will, when the ownership of that site is proved to exist in the former owner, remain in him, and the accretions will not belong to the adjacent proprietor. This rule cannot, however, be taken to apply to land in which, by long possession or otherwise, another party has acquired an indefeasible title. Although, in the case of a wandering and navigable stream, the bed of the river may be said temporarily to belong to the public domain, that state of things exists only while the water continues to run over the ground. RADHA PRO-

Re-formation on old site—continued.

SHAD SINGH v. RAM COOMAR SINGH and others ... 259

Registration—Evidence—Admissibility—Doul Fehrist—Registration Act VIII of 1871, sec. 17.] A doul fehrist containing a list of the holdings and rates of rent of the ryots with their signatures, and specifying that these holdings were to continue for seven years, does not constitute a contract to cultivate for that period, and is admissible in evidence without being registered. KARTICKNATH PANDAY v. KHAKUN SINGH 328

2. ——— See UNREGISTERED DEED OF SALE ... 542

Regulation (Bengal) VIII of 1819.

1. ——— *Sec. 14, cl. 1.—Failure of Consideration—Sale of Putni Tenure—Regulation VIII of 1819.]* Where a zemindar sells a putni 'enure for arrears of rent, and the sale is afterwards set aside, the purchaser can, under Regulation VIII of 1819, sec. 14, cl. 1, require the Court to compel the zemindar to indemnify him on account of all payments of rent which he may have made; and if he does not do so, he cannot set up his loss in answer to a liability which he has incurred. Where a sum of money becomes due and payable at a specified time, the Court may award interest, in the shape of damages, for such period thereafter as the money remains unpaid. TANA CHAND BISWAS and others v. NAFAR ALI BISWAS ... 236

Section 7. See PATNI TALOOK ... 464

Section 15. See PATNI TALOOK ... 464

——— (Bengal) XIX of 1793, sec. 9. See LAKHIRAJ LANDS ... 596

Remand—Effect of Remand Order—Prayer for Relief, General and Special.] Where a party, dissatisfied with the decision of the lower Court, appeals to the High Court and re-opens the whole case, he must acquiesce in the result finally arrived at by the Court below in accordance with the instructions of the High Court in his Special Appeal. GUNGARAM DUTT v. CHOWDHRY JUNMAJOY MULLICK ... 144

2. ——— *Wrong action of Moonsiff—Amended plaint—Duty of lower Appellate Court—Remand.]* Where the Moonsiff, acting erroneously, forced the plaintiffs to amend their plaint, and, in consequence of that amendment, the Moonsiff also amended the issues and tried the suit on an entirely erroneous issue, the Judge of the lower Appellate Court, as a Court of Equity, should, of his own motion, have sent the case back to the Moonsiff, directing him to try it on its merits, and printing out that he had taken an entirely erroneous view of the law. GURU PRASHAD ROY v. RASH MOHUN MUKHOPADHYA ... 431

Rent of Lakhiraj Lands The right of a zemindar to exact from a tenant payment of rent for a certain piece of land in no way

Rent of Lakhiraj Lands—continued.

depends on whether he does or does not pay revenue for that land *JOTENDRO MOHUN TAGORE v. AYUN BREEBE* ... 366

Re-opening of case decided—Sec. 536, Code of Criminal Procedure—Maintenance of child.] When a duly empowered Magistrate has decided a matter under sec. 536, Code of Criminal Procedure, by dismissing the application after hearing the evidence offered, the District Magistrate is not competent to entertain the complaint *de novo*. *In the matter of MUSSAMUT JAMOTI* ... 89

Res Judicata—Suit to re-open issue decided on intervention of third party in a suit under Act VIII (B.C.) of 1869. (Bengal Rent Law).] T sued for arrears of rent on a specific share of a tenure. G intervened, denying T's right and title, and claiming the right to receive the entire rent. An issue was then tried whether T was entitled to receive the rent claimed as against G: *Held*, that the question of title having been determined, G could not sue to re-open the same matter. *GOVIND CHUNDER KUNDU v. TARUK CHUNDER BOSE* ... 35

— See ADVERSE POSSESSION 531

Resistance to Possession. See SALE IN EXECUTION OF DECREE. (1) ... 517

Revocation of Will. See WILL ... 118

Right of Occupancy, independent of landlord's title.] A ryot who occupies land for a period of twelve years acquires therein a right of occupancy, whether the person under whom he holds has any title to the land or not. *SYUD AMER HOSSEIN v. SHEO SAHAI*, 19 W. R., 338, cited and followed. *SREEMUTTY ZULFUM BREEBE v. RADHICA PROSUNNO CHUNDER*... 388

2. — Nij-jote—Act VIII (B.C.) of 1869, sec. 6—Act X of 1859, sec. 6.] The *nij-jote* land referred to in Act VIII (B.C.) of 1869, sec. 6, as land in which a right of occupancy cannot be acquired, is land which is the *nij-jote* of the zemindar, and not that which is merely the *nij-jote* of a sarbarakar holding under the zemindar. *OBHOY CHURN MOHAPATTUR v. KANYE RAWUT* ... 394

Right of Way—Exercise of right—Obstructions.] A person who has a right of way cannot claim anything more than that the reasonable exercise of his right shall not be obstructed. It is only ownership of the land that carries with it the ownership of every thing *usque ad caelum*. *TOULSEEMONY DEBEE v. JOGESH CHUNDER SHAHA* ... 425

Rioting—Attacking party—Right of private defence.] Where both parties are armed and prepared to fight, it is immaterial who is the first to attack, unless it is shown that that party was acting within the legal limits of the right

Rioting—continued.

of private defence.—*KALEB BEPAREE* and others ... 521

Sale in execution of decree—Auction-Purchaser—Resistance or Obstruction to Possession—Act X of 1877, secs. 334, 335.] If the purchaser at a sale in execution of a decree be resisted or obstructed when being put in possession by the Court as provided by the new Code of Civil Procedure, Act X of 1877, the Court can now act only under sec. 334 or sec. 335 of that Code. There is no provision in the Code for a summary inquiry on resistance or obstruction to the possession of an auction-purchaser caused by a stranger claiming to be in actual possession under a title altogether independent of the judgment debtor. *SHAIKH HARASTOOLAH v. BROJO NATH GHOSH* ... 517

2. — Postponed notice—Proclamation—Act VIII of 1859, secs. 249, 256.] Where a sale in execution of a decree, fixed for a certain date, is postponed to another day, all the formalities required by Act VIII of 1859, sec. 249, should be gone through afresh, unless these have been waived by consent of the parties. Absence of notice of postponement is presumptive evidence of substantial injury within the meaning of Act VIII of 1859, sec. 256. *OBHOY CHUNDER DUTT v. ESKINE & Co.*, 3 W. R., 11, *Mis.*, cited and followed *GOPES NATH DOBAY v. ROY LUCHMEERUT SINGH* ... 349

Sale—Notification of Sale—Sale Certificate—Sale under Act VIII of 1859, sec. 249, in execution of a decree for arrears of rent.] Where on an execution sale there is a discrepancy between the conditions in the notification of what is to be sold, and the certificate of what has been sold, the conditions in the notification are to be taken as of superior authority, in dealing with the conflicting claims of innocent third parties whose rights are affected by the variation. In execution of a decree for arrears of rent, an application was made for a sale of the tenure for the arrears of which the decree had been obtained. A notification was issued purporting to be a sale proclamation under Act VIII of 1859, sec. 249, and in pursuance of that notification the sale of the right, title and interest of the judgment-debtor took place: *Held*, that the tenure did not pass by that sale, notwithstanding that the sale certificate stated it was the tenure itself which had been sold. *UMA CHURN SEN v. GOBIND CHUNDER MOZUMDAR* ... 460

Second Conviction—Sec. 75, Indian Penal Code—Sentence.] Where, soon after his release on expiry of a sentence of seven years' imprisonment conviction of "receiving stolen property" acquired by dacoity, a person is convicted of house-breaking and theft, he is sufficiently

Second Conviction—continued.

punished by a sentence of seven years in transportation; a sentence of transportation for life is too severe. It is not the intention of the Legislature that a previous conviction should so enormously enhance the heinousness of petty offences. *SHAMJEE NASHYO*, Appellant 481

Secondary Evidence. See *KABULIAT. UNREGISTERED DEED OF SALE*. 241, 542

Sentence. See *SECOND CONVICTION*. ... 481

Separation. See *DIVORCE*. 552

Small Cause Court. See *SPECIAL APPEAL, TENDER* 33, 470

Special Appeal—Act XXIII of 1861, sec. 27—Questions of title incidentally raised.] The fact that a question of title to immoveable property may have been incidentally tried does not give a right of Special Appeal in a case cognizable by a Small Cause Court for a matter valued at less than 500 rupees. *MOHESH MAHATO v. SHEIKH PEROO* 33

2. ————— in *Rent Suits—Act VIII (B.C.) of 1869, sec. 102.* *Held* (L. S. JACKSON, J., *dis.*) that there is no right of Special Appeal in the cases specified in sec. 102, Act VIII (B. C.) of 1869. *Per* GARTH, C.J. and MACPHERSON and MARKBY, J.J.—That this matter has been settled by a Full Bench (*BROJO MISSE v. MUSSUMAT ABLAKKE MUSEAIN*, 21 W. R., 320; 13 B. L. R., 376); and a long course of decisions which should not be disturbed. *Per* GARTH, C.J.—That otherwise there is a right of Special Appeal, the Bengal Legislature having acted *ultra vires* in enacting sec. 102, Act VIII (B.C.) of 1869. *Per* L. S. JACKSON, J.—That there being the right of Special Appeal, no course of decisions can affect it. *Per* MACPHERSON and MARKBY, J.J.—That it is not for the Court now to consider the matter, which, if wrongly decided, can only be rectified by the Legislature of the Government of India. *Per* AINSLIE, J.—That the Bengal Legislature, by enacting sec. 102, Act VIII of 1869, did not act *ultra vires*, because it did not touch any right of Special Appeal in rent suits then subsisting. *MUSSUMAT LAKHESUR KOER v. SOOKHA OJHA* 39

3. ————— See *DECLARATORY SUIT. NOTICE TO QUIT*. 404

Specific Performance—Construction of Contract—Vagueness.] Where, on the settlement of plaintiff's zemindari, Government stipulated to retain under its own control the construction of embankments and excavation of canals within the zemindari, and afterwards allowed a certain canal to silt up, and the drainage to be impeded, to the injury of plaintiff's land and crops: *Held*, that no suit based on the stipulation would lie against Government to compel the re-excavation

Specific Performance—continued.

and maintenance of the canal, because (1) the terms of the stipulation were too vague and general; and (2) the course last pursued by the Government may have been, on the whole, the best for carrying out the purpose for which the stipulation was made, namely, the comfort and health of the population. Even before the Specific Relief Act was passed, the policy of the law was against the enforcement of specific performance of contracts of this nature. (*HUNDER SIKHUR MOOKERJEE v. COLLECTOR OF MIDNAPORE* 384)

Splitting of Tenure. See *EVIDENCE OF SPLITTING OF TENURE* 248

Statutes.—11 and 12 Vic., Chap. 21, Sec. 26, See *INSOLVENT ACT*. 421, 561

Stolen Property—Bank Note—Goods—Contract Act—Right of Appeal by complainant—Code of Criminal Procedure, secs. 286, 418, 419.] A Government currency note stolen from A was cashed with B. The thief was tried and convicted for the theft, and after this conviction the Magistrate ordered the note to be returned to B: *Held*, that the Sessions Judge was, under sec. 419 of the Code of Criminal Procedure, the proper person to deal with an application made by A for the reversal of that order. Where a stolen currency note has been delivered to a *bona fide* holder for value, the Court will not, on conviction of the thief, restore the note to the person from whom it was stolen. A Government currency note is not "goods" within the meaning of the Contract Act. *In the matter of CAPTAIN MICHELL* 339

Strreedhun—Mitakshara—Dayabhaga—Separate property of Women, distribution of—Act I of 1869 (Oudh Estates' Act).] The Mitakshara and Dayabhaga on the separate property of women and its distribution discussed. The positive limitations regarding succession, which are contained in sec. 22, Act I of 1869, are in no way controlled by the provision in 3rd section of the Act, namely, that the right acquired by virtue of a Taluqdari Sunnud should be subject to all the conditions affecting the Taluqdar contained in the Sunnud under which the estate is held. *MUSSAMUT THAKOOR DRYER v. RAI BALUK RAM*, 11 Moore's Ind. App., 189; 10 W. R., 3, P. C., quoted as containing the rule for devolution of property inherited by a woman from her husband. Act I of 1869 (the Oudh Estates' Act) discussed and explained. *BEJI INOAR BAHADUR SINGH and others v. RAJEE JANKI KOOR* 318

Suit to recover excess payments under decrees—Payments of enhanced rent decreed—Liability of tenure to enhancement disallowed—Suit to recover excess payment.] I obtained a decree, declaring that K's tenure was liable to enhancement of rent. He thereupon, from time to time,

Suit to recover excess payments &c.—contd.

sued for and obtained decrees at the rate thus allowed, the ryot K objecting. K, who had appealed to the Privy Council, obtained an order declaring that the rent was not liable to enhancement. He, accordingly, sued to recover the excess payments of rent made by him under the decrees obtained by J, while the matter of enhancement was under appeal. *Held*, (per GARTH, C.J., and L. S. JACKSON, J.) that, so long as the decrees for rent at the enhanced rates remain unreversed expressly, no suit will lie to recover money paid under them. *MARRIOTT v. HAMPTON*, 2 Sm. L. C., 6th Ed., p. 375. *Contra* (per MACPHERSON, MAHEKY and AINSLIE, J.J.)—That, admitting this general principle, under SHAMA PROSHAD ROY CHOWDREY v. HURRO PROSHAD ROY CHOWDREY (10 Moore Ind. App., 203), the right to enhance the rent being disallowed, the decrees for rent at enhanced rates obtained during the pendency of the determination of that right were affected, and a suit would lie to recover excess payments made thereunder. *KALICHURN DUTT v. JOGESH CHUNDER DUTT*... 5

Suit for Possession after Foreclosure.
See VALUATION 473

Summary Trial—Act XXI of 1856, sec. 49—Confiscation—Fine—Code of Criminal Procedure, sec. 222. The confiscation, which is provided for by sec. 49, Act XXI of 1856, is merely a consequence of the conviction, and does not form part of the punishment for the offence. An offence under that section, which is punishable with fine, may, therefore, be tried summarily by a Magistrate under sec. 222 of the Code of Criminal Procedure, Act X of 1872. *KHETTER MOHUN CHOWRANGI*, 22 W. R., Cr., 43; and *JUDDOO NATH SHAHA*, 23 W. R., Cr., 33, overruled. *In the matter of BALDIYANATH DASS* 442

2. Sec. 222, Code of Criminal Procedure—Jurisdiction—Sec. 34, cl. iv.] Where, on the facts found by a Magistrate, an offence is established which he cannot try summarily, he is not competent to convict for an offence made up of only some of those facts in order to give himself jurisdiction. Such proceedings are void under sec. 34, cl. iv. of the Code of Criminal Procedure, because he was not empowered by law to try the offender summarily. *In the matter of CHUNDER SEKHOR SOOKUL* 434

Tender—Small Cause Court—Costs—Tender before action brought. A demanded Rs. 1,800 as one sum due to him from B, and B tendered Rs. 1,000 to A, saying that was all he owed him. On action brought, a decree was given to A for the Rs. 1,800, and it was held that A was entitled to full costs; he not having been under any obligation to accept the Rs. 1,000 and sue for the remaining Rs. 800 in the Small Cause Court. An offer to pay a portion of a debt in discharge

Tender—continued.

of the whole is not a legal tender. *JAMES v. VANE*, 29 Law Jour. Q. B., v. *SEAMAN*, 11 C. B., 524; *DIXON v. CLARKE*, 5 C. B., 365, discussed. *CHUNDER KANT MOOKERJEE v. JUDDOO NATH KHAN* 470

Title. See NOTICE OF TITLE 466

Transferable Tenure—Practice—Issues—Intermediate Holding—Act VIII (B.C.) of 1869, sec. 26. In determining whether a tenure is a permanent transferable interest within the meaning of sec. 26, Act VIII (B.C.) of 1869, the issues should be so framed as to raise distinctly the question whether the tenure was an intermediate one between the landlord and the ryot. *SIB CHURN SEN v. JONARDHON DEY* ... 397

Transfer of decree for Execution. See EXECUTION OF DECREE. (1) 539

Trustee—Breach of Trust—Removal of Trustee—Declaration of Trust. The Court will not, at the instance of one of two defaulting trustees, declare the liabilities arising from a breach of trust without having all the parties concerned before it. Nor will the Court pass an order which might in any way tend to be construed as an assent to a breach of trust already committed, even though the breach may have been beneficial to the trust estate. *JOHN BOYLE BARRY v. OCTAVIUS STEEL* 80

Under-tenure. See SALE. (3) 460

Unregistered deed of sale—Secondary Evidence—Proof of Title. Plaintiff alleged that A and B had sold and conveyed, by an unregistered deed, certain land to the person under whom he claimed. The deed being inadmissible in evidence, B was called to prove the sale: *Held* that B's evidence should have been rejected, as secondary evidence of the unregistered deed could not be received. *RAM CHUNDER HALDAR v. GOBIND CHUNDER SEN* 542

Usufructuary Mortgage—Construction of Document. In ascertaining whether a deed, confessedly ambiguous, amounts to an usufructuary mortgage or to a lease in perpetuity, the Judge should look within the four corners of the instrument before him, and ascertain from it what kind of transaction the parties had in view when they entered into it. In the case of an usufructuary mortgage, where no term is specified, the mortgagor is entitled to re-enter on the property when, on taking an account, he is able to show that the principal and interest have been satisfied. *LALA DOUL NARAIN and others v. RANJIT SINGH and others* ... 256

Vagueness. See MORTGAGE 91

Valuation—Suit for Possession after Foreclosure—Court Fees' Act, 1870, sec. 7, cl. 9.] Where a suit for possession is brought after a

a. Measure has been obtained, the such a suit, in so far as the jurisdiction of the Court is concerned, is not to be calculated according to the scale laid down in the Court Fees' Act, sec. 7, cl. 9. **AHOLLYA BAI DEBIA v. SHAMA CHURN BOSE** ... 473

Verdict of Jury.—Sec. 263, *Code of Criminal Procedure*.—*Dissentient opinion of Sessions Judge—High Court.*] *Per CURIAM.*—A very large discretionary power is vested in the High Court by sec. 263 of the Code of Criminal Procedure. No fixed rules can be laid down for the exercise of that discretion in every instance; and the decision in each case submitted must depend upon its own peculiar circumstances. *Per GAETH, C.J., and PRINSEP, J. (MARKBY, J., contra).*—The rule laid down in **QUEEN v. WAZIR MUNDUL**, 25 W. R., 25, Criminal Rulings, goes too far. *PRINSEP, J. (MARKBY J., contra).*—The law does not prevent a Sessions Judge from asking a Jury regarding the grounds for their verdict, and such a course is desirable in the ends of justice. See **QUEEN v. SUSTIRAM MUNDUL**, 21 W. R., 1. **THE EMPRESS v. MUKHUN KUMAR** ... 275

Widow, Hindoo. See **MITAKSHARA** ... 97

Withdrawal of order.—Sec. 521, *Code of Criminal Procedure*.—*Value of Evidence—Court of Revision.*] When after enquiry a Magistrate finds that there is no sufficient cause for proceeding under sec. 521 of the Code of Criminal Procedure, he is competent to let the matter drop. As a Court of Revision, the High Court will not enter upon a consideration of the value of the evidence on which the Magistrate decided so

Withdrawal of order—continued.

to act. *In the matter of SHONAI PARAMNICK* Petitioner 46

Will—Act I of 1869, sec. 22, cl. 4—Hind Will—Revocation by Parol.] Discussion of what is meant by placing one's self in *loco parentis* within the meaning of cl. 4 of sec. 22 of Act I of 1869 (the Oudh Estates' Act). There is no doubt that the will of a Hindu may be revoked by parol; but there is great danger in acting upon such evidence as is ordinarily produced in the Courts in India in order to effect such a revocation, and those Courts should in every case apply the law with the most extreme caution. If definitive authority is given to the person with whom a will is deposited to destroy it, that constitutes revocation, even though the instrument be not destroyed. **MAHARAJAH PERSAD NARAIN SINGH v. MAHARANEE SUBHOO KUMAR and others** 14

2. — See **PROBATE** 32

3. — *Construction—Gift of surplus—The Gift—Residue.*] Where, in a will, certain bequests were made, and, "should there be any surplus after the above expenditure," that surplus was to go in a certain and legitimate way: *Held*, that the gift of the "surplus" was equivalent to the gift of the residue; and that the preceding bequests would, in the event of their proving invalid, fall into the residue and pass with it under the will. **CHAPMAN v. BROWN**, 6 Vesey, 404; **MITCHELL v. REYNOLDS**, 1 Ph., 185; **FRISK v. THE ATTORNEY GENERAL**, Law Rep., 4 Eq., 521; discussed in **DWARKANATH BYSACK v. BURRODA PERSAD BYSACK** 38

Women, Separate Property of. See **STREENDHUN** 14

